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APPENDIX

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

October Term, 1976

No. 76-[illegible]

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Petition for [illegible]

Petitioners' Appendix

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Appendix A

Docket Entries for United States District Court for the Western District of Pennsylvania

Civ. No. 72-440

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Plaintiffs,

against

GEORGE AIKEN,

Defendant.

DATE	PROCEEDINGS
1972	
6- 2	Complaint filed.
6- 2	Summons issued.
6- 5	Copyright notice mailed Commissioner of patents.
6- 8	Summons returned served on deft. 6/6/72.
7- 7	Motion to Dismiss filed by Deft.
9-11	Notice of Arg. for 10/5/72 at 4:00 filed.
10- 6	Hearing on Motion to Dismiss held 10/3/72 and concluded before Weis, J. (Motion—Denied) (Memo filed) (Rep: None).
10-18	Order entered denying deft's Motion to Dismiss. (Weis, J.)
10-30	Answer filed.
11-14	Rule 511 invoked.
12-11	Notice of Preliminary Conference for 12/21/72 at 4:00 filed.

Appendix A

DATE	PROCEEDINGS
12-22	Hearing on Conference held 12/21/72 before Weis, J. and concluded. (Memo filed) (Rep: None) (Case not to be called until February 1973)
1973	
1- 2	Letter dated 12/22/72 to Judge Weis from Bernard Korman received and filed.
2- 1	Notice of trial for 2/8/73 filed.
2- 8	Non Jury Trial began before Weis, J. and taken CAV. (Memo filed)
3-19	Transcript of proceedings held 2/8 before Weis, J. (rep C R Shuff)
3-26	Opinion filed and Order entered directing that Judgment is entered against the deft and in favor of the pltf Twentieth Century Music Corp., in the sum of $250.00; Judgment is further entered against the deft and in favor of the pltf Mary M. Bourne in the sum of $250.00; further ordered that deft shall pay the costs incurred, such costs shall not include counsel fees. (Weis, J.)
3-26	Pursuant to Opinion filed and Order entered Judgment is hereby entered accordingly. Bernard Schaffler, Clerk.
3-26	Notices mailed.
4-25	Notice of appeal filed by deft. ($250.00 Costs Bond posted)
4-25	Copy of notice of appeal mailed Court of Appeals; copy of notice to opposing counsel; letters to all counsel of record and to Judge Weis.
5-21	Original record and exhibits mailed U.S. Court of Appeals.

Appendix B

Complaint Filed in the United States District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

[TITLE OMITTED IN PRINTING]

Plaintiffs, complaining of the defendant, by Thorp, Reed & Armstrong, their attorneys, allege:

For a First Cause of Action, Plaintiff Twentieth Century Music Corporation Alleges:

1. This action arises under Title 17, U.S.C., as hereinafter more fully appears.

2. The plaintiff, Twentieth Century Music Corporation ("Twentieth Century") is the proprietor of the copyright in the musical composition "THE MORE I SEE YOU".

3. Defendant, George Aiken did, at the times hereinafter mentioned, and still does, own, control, manage, operate and maintain a place of business for public entertainment, accommodation, amusement and refreshment known as George Aiken Chicken, and located at Seventh Avenue, Liberty Avenue and Smithfield Street, in Pittsburgh, in the State of Pennsylvania.

4. Musical compositions were and are publicly performed for profit as part of the entertainment regularly provided at said place of business.

Appendix B

5. Prior to February 19, 1945, Mack Gordon and Harry Warren, citizens of the United States, created and wrote an original musical composition entitled "THE MORE I SEE YOU".

6. On February 19 and February 20, 1945, Twentieth Century as proprietor of the composition complied in all respects with Title 17, U.S.C., and secured the exclusive rights and privileges in and to the copyright of said composition, and received from the Register of Copyrights a certificate of registration, identified as follows: "CLASS E pub. No. 129660".

7. Since February 19, 1945, said composition has been printed and published in strict conformity with Title 17, U.S.C.

8. At the times of the acts of infringement hereinafter complained of, Twentieth Century was and still is the proprietor of the copyright in said musical composition.

9. A copy of Twentieth Century's copyrighted composition is hereto attached as Exhibit "A".

10. Defendant on March 11, 1972, and upon information and belief, at other times prior and subsequent thereto, infringed such copyright by giving public performances of such composition on defendant's premises, for the entertainment and amusement of the patrons attending said premises, for the purpose of profit and defendant threatens to continue such infringing performances.

11. The said wrongful acts of defendant have caused and are causing great injury to plaintiff, Twentieth Century, which damage cannot be accurately computed, and unless this Court restrains the defendant from the further

commission of said acts, said plaintiff will suffer irreparable injury, for all of which the said plaintiff is without any adequate remedy at law.

12. Both of the plaintiffs joined in this complaint have causes of action against the defendant which are properly joined in one action under Rule 20 of the Federal Rules of Civil Procedure, 28 U.S.C.

For a Second Cause of Action, Plaintiff Mary M. Bourne Alleges:

13. Realleges each and every allegation contained in Paragraphs "1", "3", "4", and "12" of the first cause of action.

14. The plaintiff, Mary M. Bourne, is the proprietor of the copyright in the musical composition "ME AND MY SHADOW".

15. Prior to May 10, 1927, Billy Rose, Al Jolson and Dave Dreyer, citizens of the United States, created and wrote an original musical composition entitled "ME AND MY SHADOW".

16. On May 10, 1927 and May 11, 1927, Irving Berlin Inc. as proprietor of the composition complied in all respects with Title 17, U.S.C., and secured the exclusive rights and privileges in and to the copyright of said composition, and received from the Register of Copyrights a certificate of registration identified as follows: "Entry: Class E, XXc., No. 664495".

17. Said copyright was renewed by due registration in the office of the Register of Copyrights, who thereupon

issued Certificate of Registration of a Claim to the Renewal of a Copyright in the names of Mrs. Erle Krasna, claiming as widow of Al Jolson, author of the music; Dave Dreyer, claiming as author of the music; and Billy Rose, claiming as the author of the words, dated and identified as follows: May 11, 1954; R 130511".

18. Since May 10, 1927, said composition has been printed and published in strict conformity with Title 17, U.S.C.

19. At the times of the acts of infringement hereinafter complained of, Mary M. Bourne was and still is the proprietor of the copyright in said composition.

20. A copy of Mary M. Bourne's copyrighted composition is hereto attached as Exhibit "B".

21. Defendant on March 11, 1972, and upon information and belief, at other times prior and subsequent thereto, infringed such copyright by giving public performances of such composition on defendant's premises, for the entertainment and amusement of the patrons attending said premises, for the purpose of profit and defendant threatens to continue such infringing performances.

22. The said wrongful acts of defendant have caused and are causing great injury to plaintiff, Mary M. Bourne, which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts said plaintiff will suffer irreparable injury, for all of which the said plaintiff is without any adequate remedy at law.

Appendix B

WHEREFORE, plaintiffs pray:

I. That defendant and all persons acting under the direction, control permission or authority of defendant be enjoined and restrained permanently from publicly performing the aforementioned compositions or any of them and from causing or permitting the said compositions to be publicly performed in defendant's said premises, or in any place owned, controlled or conducted by defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise.

II. That defendant be decreed to pay plaintiffs such damages as to the Court shall appear proper, but not less than Two Hundred and Fifty Dollars ($250.00) in each cause of action herein.

III. That defendant be decreed to pay the costs of this action and that a reasonable attorneys' fee be allowed to be ratably shared by plaintiffs as part of the costs.

IV. For such other and further relief as may be just and equitable.

Thorp, Reed & Armstrong
Attorneys for Plaintiffs
Office & P. O. Address
2900 Grant Building
Pittsburgh, Pennsylvania

By .....
(Member of said firm)

Exhibit A Annexed to Complaint

Twentieth Century's Copyrighted Composition

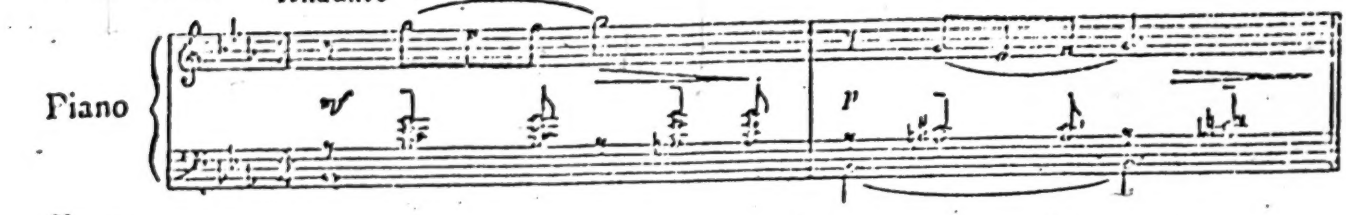
(See Opposite ☞)

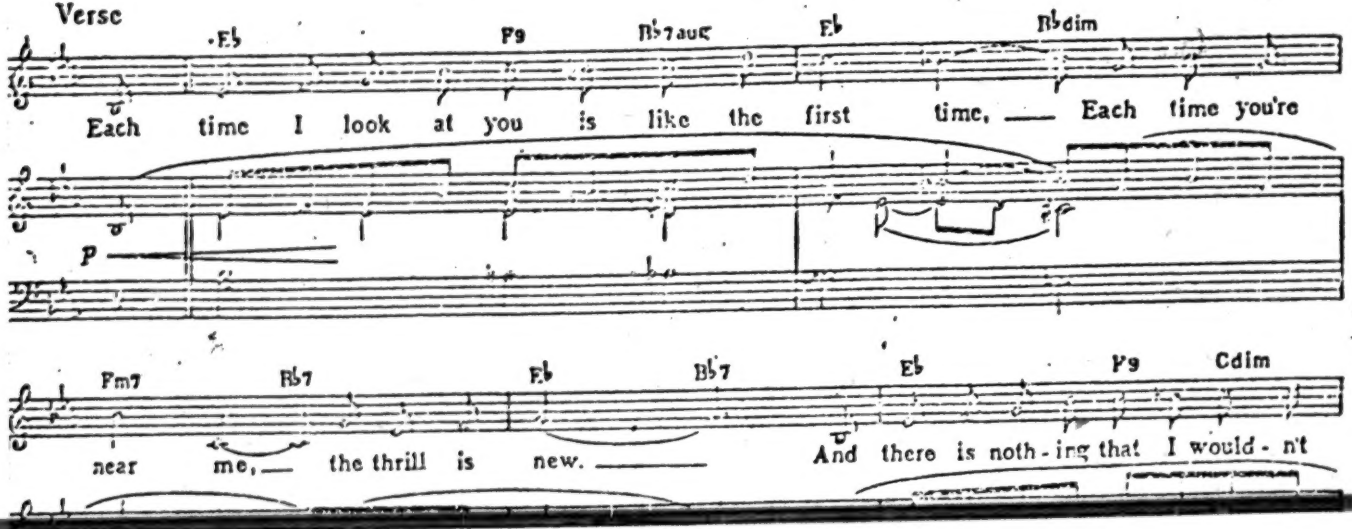
From the 20th Century-Fox Technicolor Musical Billy Rose's DIAMOND HORSESHOE

THE MORE I SEE YOU

Words by
MACK GORDON
A.S.C.A.P.

Music by
HARRY WARREN
A.S.C.A.P.

Andante

Verse



From the 20th Century-Fox Technicolor Musical Billy Rose's DIAMOND HORSESHOE

THE MORE I SEE YOU

Words by
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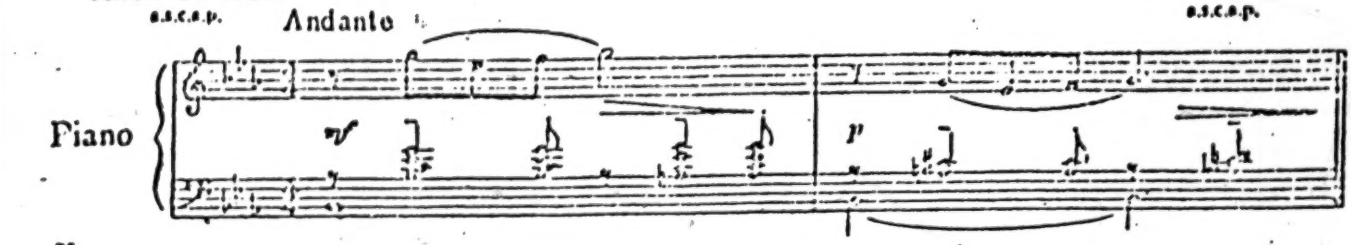
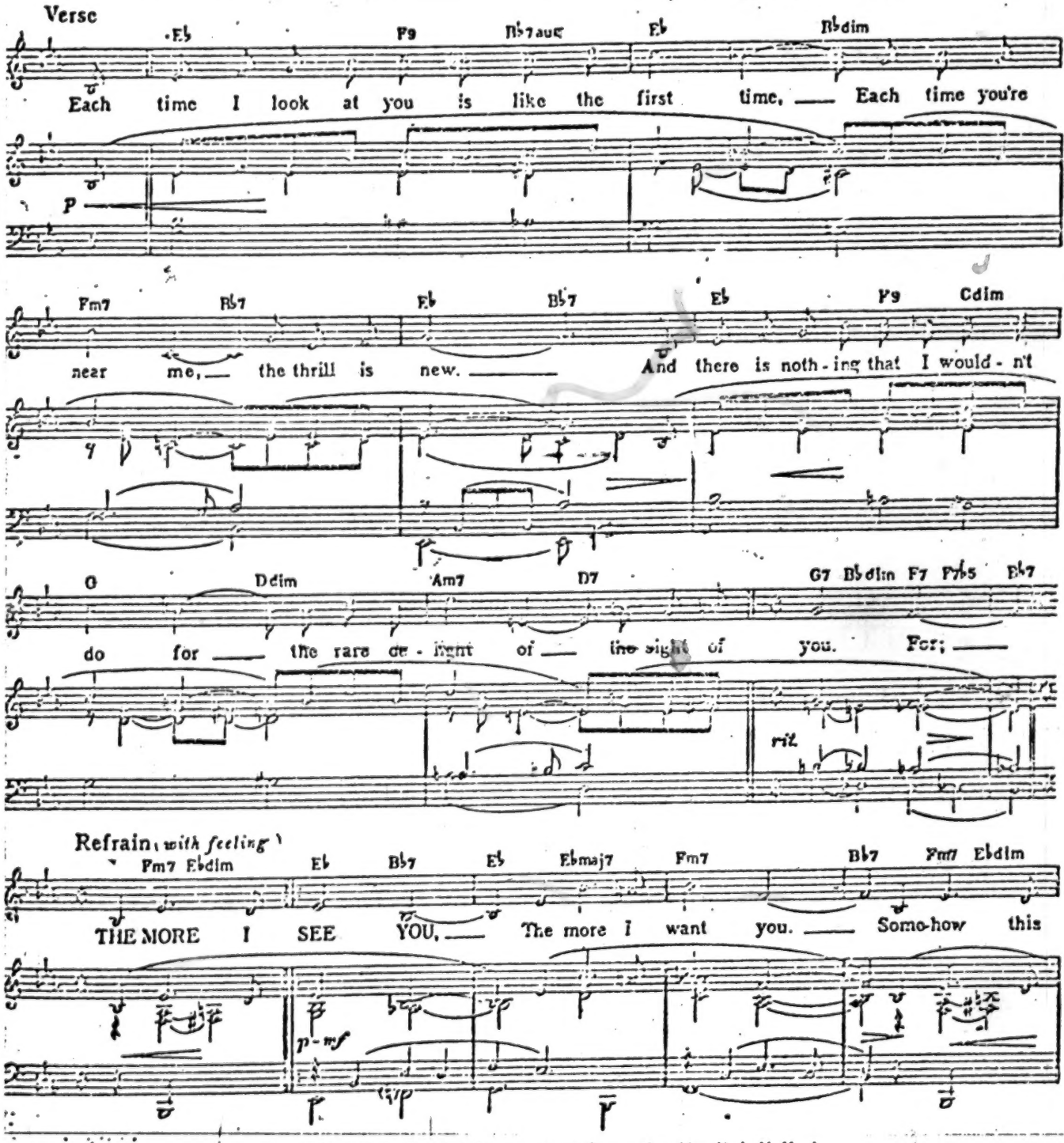
Music by
HARRY WARREN
a.s.c.a.p.

Andante

Verse


Eb F9 Bb7aug Eb Bbdim
Each time I look at you is like the first time, Each time you're
Fm7 Bb7 Eb Bb7 Eb F9 Cdim
near me, the thrill is new. And there is noth-ing that I would-n't
G Ddim Am7 D7 G7 Bbdim F7 F7b5 Bb7
do for the rare de-light of the sight of you. For;
rit.

Refrain (*with feeling*)

Copyright 1945 by Twentieth Century Music Corporation, New York, N. Y.
Rights throughout the world controlled by BREGMAN, VOCCO and CONN, Inc., 1619 Broadway, New York 19, N. Y.
International Copyright Secured
Made in U.S.A.
All rights reserved including the right of public performance for profit

"The use of the lyrics with any other music or use of the music with any other lyrics or any arrangement or adaptation of this composition is expressly prohibited."

Exhibit "B"

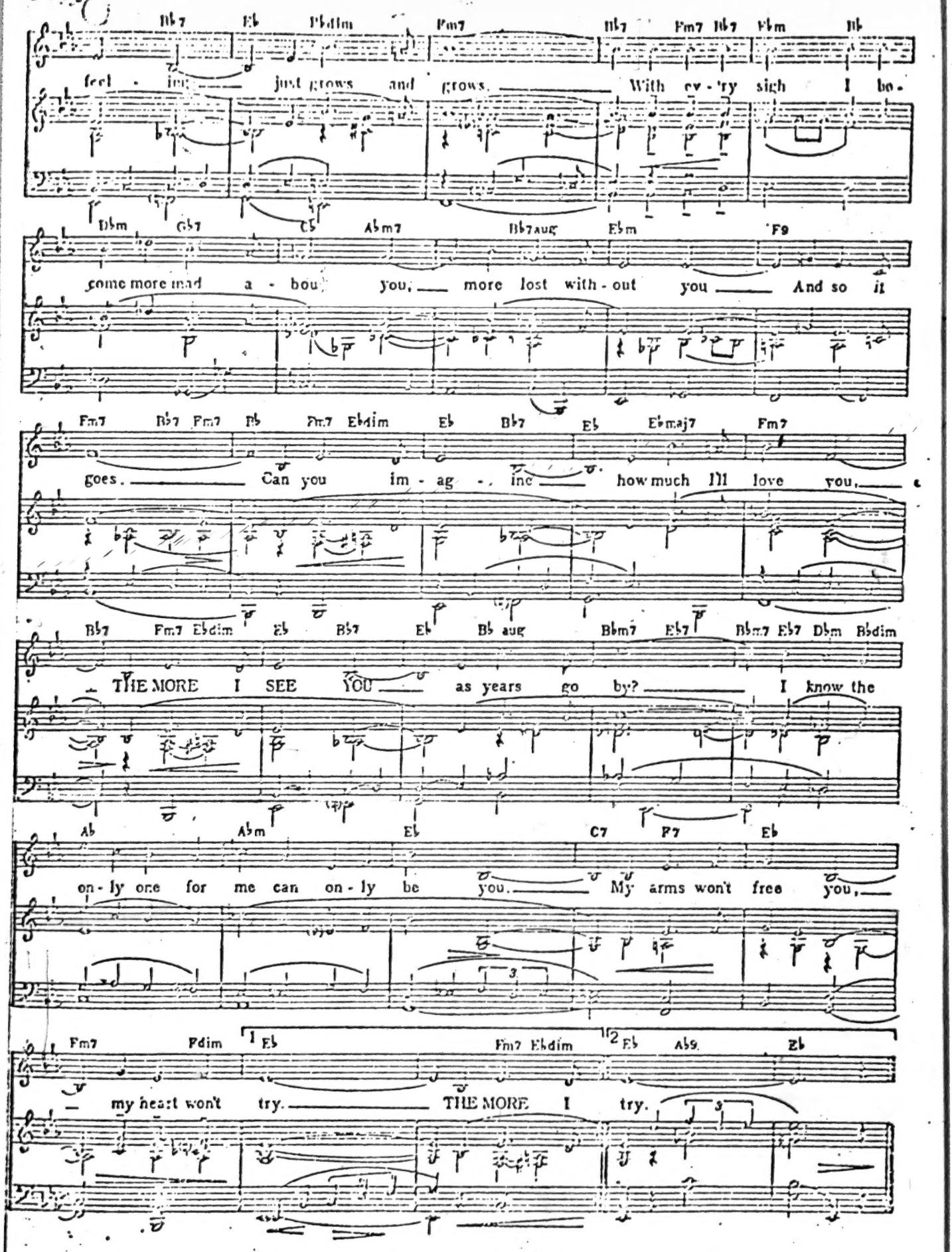

Bb7 Eb Ebdim Fm7 Bb7 Fm7 Bb7 Ebm Bb
feel - ing just grows and grows. With ev - 'ry sigh I be -
Dbm Gb7 Cb Abm7 Bb7aug Ebm F9
come more mad a - bou you, more lost with - out you And so it
Fm7 Bb7 Fm7 Eb Fm7 Ebdim Eb Bb7 Eb Ebmaj7 Fm7
goes. Can you im - ag - ine how much I'll love you,
Bb7 Fm7 Ebdim Eb Bb7 Eb Bb aug Bbm7 Eb7 Bbm7 Eb7 Dbm Bbdim
THE MORE I SEE YOU as years go by? I know the
Ab Abm Eb C7 F7 Eb
on - ly one for me can on - ly be you. My arms won't free you,
Fm7 Fdim 1 Eb Fm7 Ebdim 2 Eb Ab9 Eb
my heart won't try. THE MORE I try.

Exhibit B Annexed to Complaint

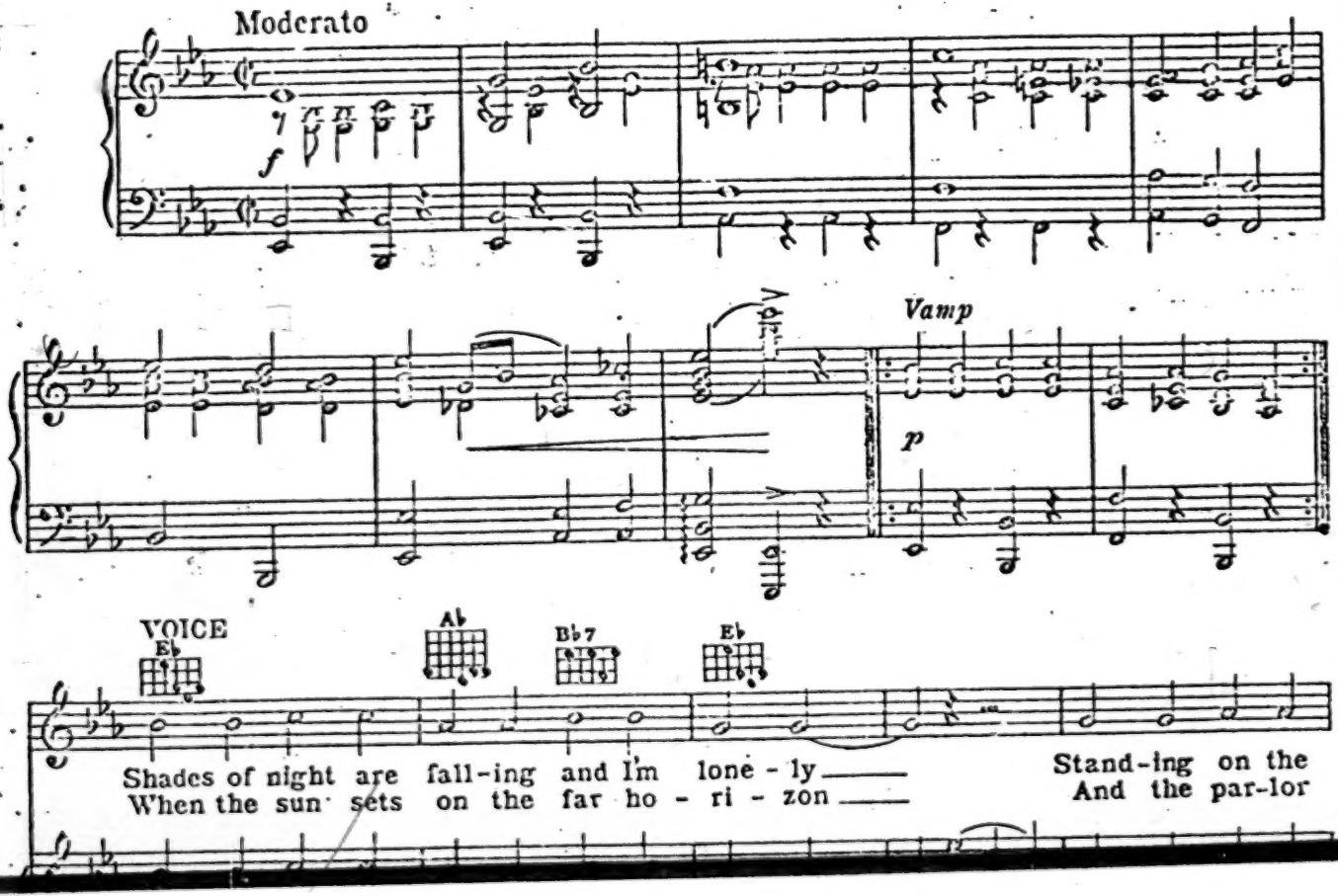
Mary M. Bourne's Copyrighted Composition

(See Opposite ☞)

Me And My Shadow

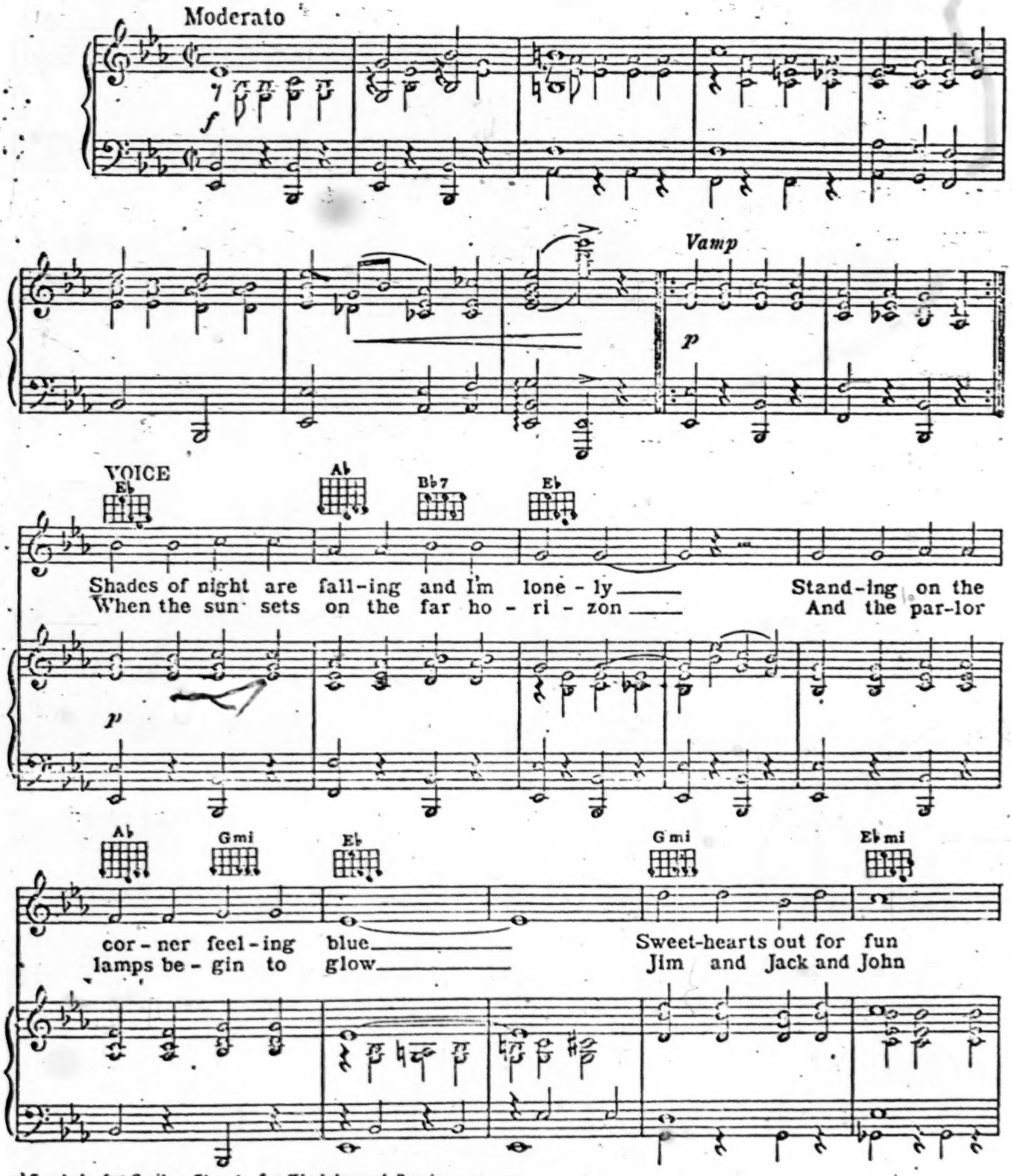
Words by
BILLY ROSE

Music by
AL JOLSON and
DAVE DREYER

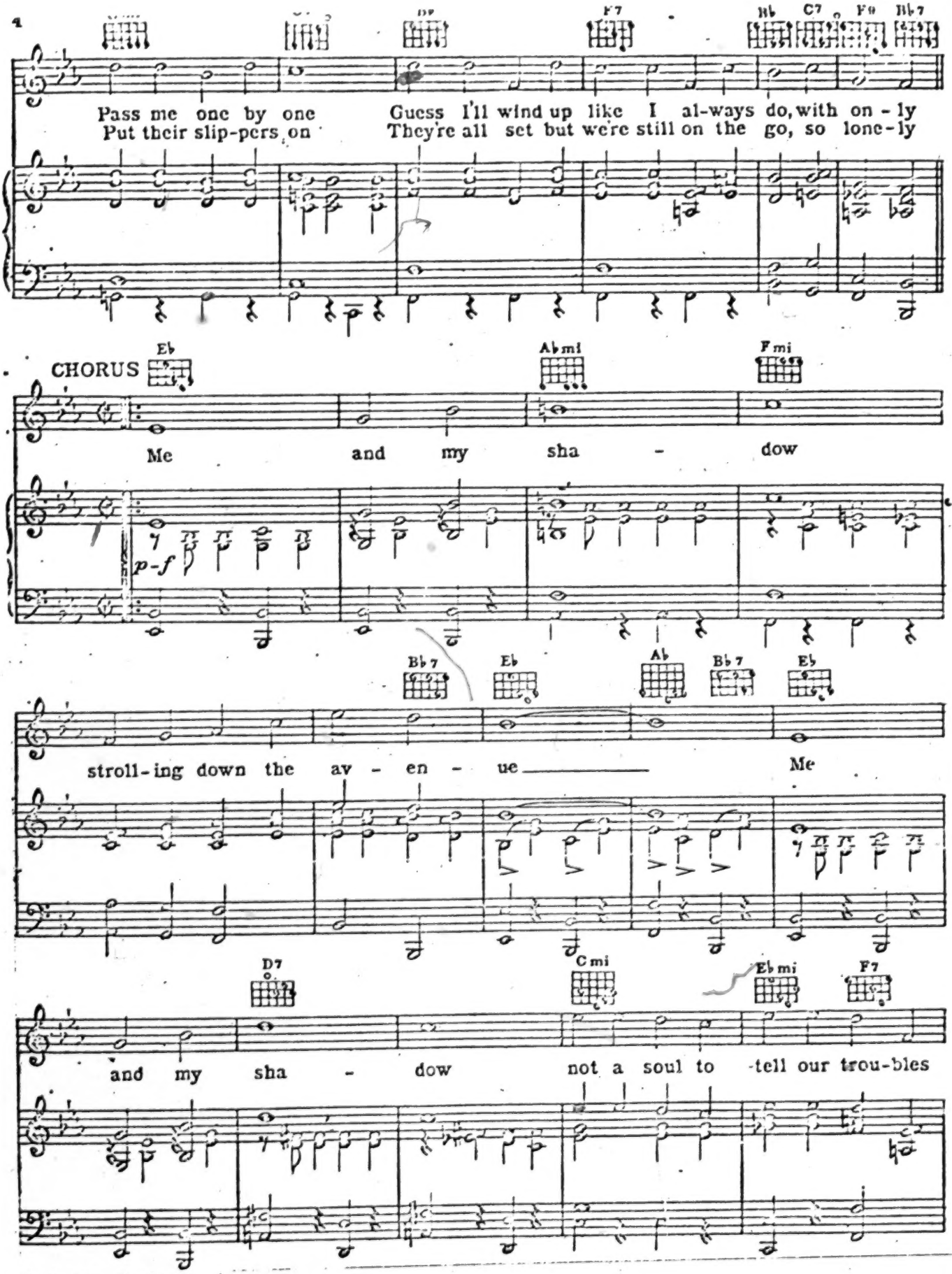


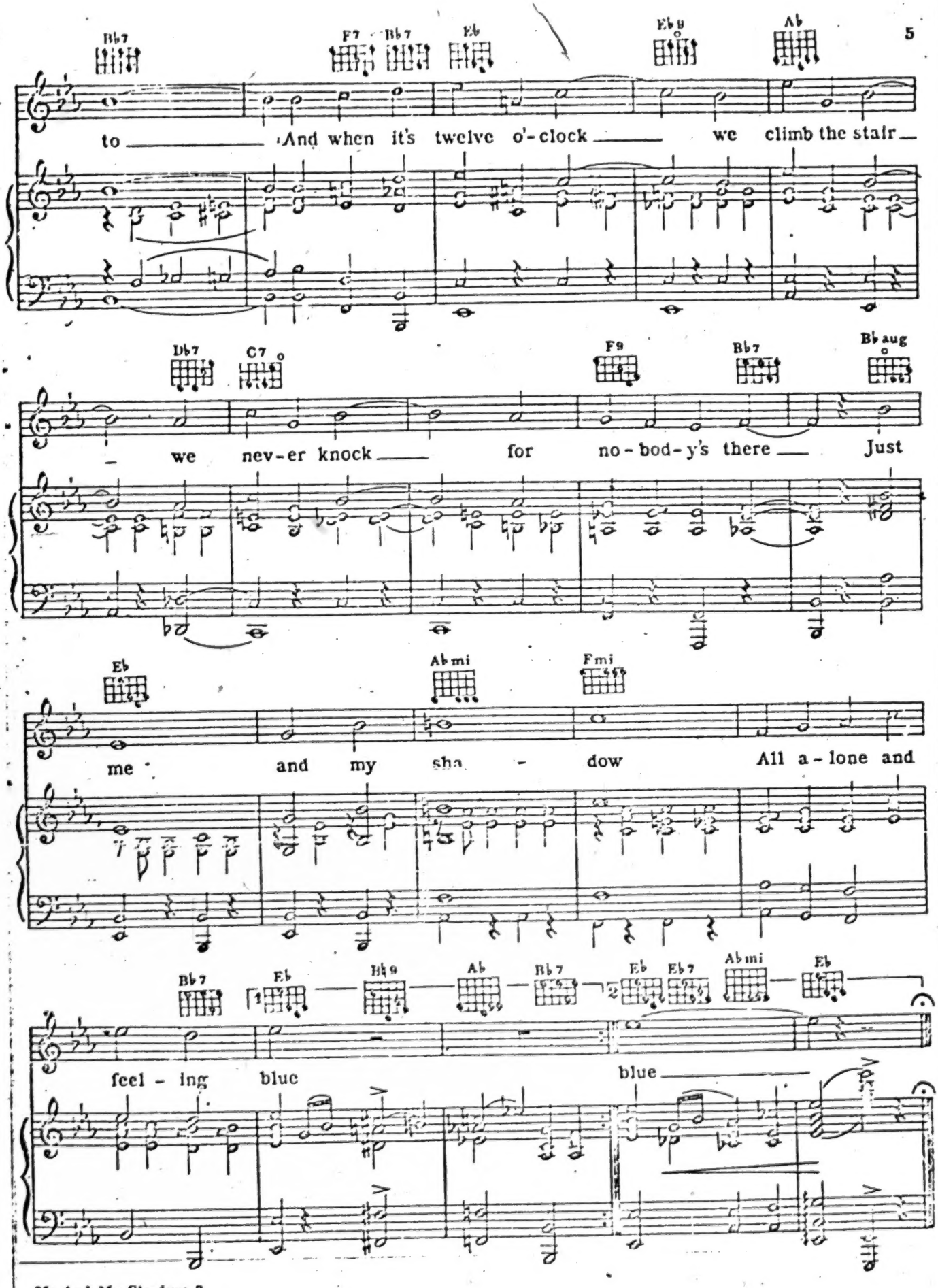
Me And My Shadow

Words by
BILLY ROSE

Music by
AL JOLSON and
DAVE DREYER

*)Symbols for Guitar, Chords for Ukulele and Banjo

Copyright 1927 BOURNE, INC.
Original proprietor Irving Berlin Inc., name changed to BOURNE, INC.
All Rights Reserved Including the Right of Public Performance for Profit
International Copyright Secured Made in U.S.A.
Copyright Renewed

EXHIBIT "B"

Pass me one by one
Put their slip-pers on
Guess I'll wind up like I al-ways do, with on - ly
They're all set but we're still on the go, so lone-ly
CHORUS
Me and my sha - dow
p-f
stroll-ing down the av - en - ue
Me
and my sha - dow
not a soul to tell our trou-bles


Bb7
F7
Bb7
Eb
Eb9
Ab
to
And when it's twelve o'-clock
we climb the stair
Db7
C7
F9
Bb7
Bbaug
we nev-er knock
for no-bod-y's there
Just
Eb
Abmi
Fmi
me
and my sha - dow
All a-lone and
Bb7
Eb
Bb9
Ab
Bb7
Eb
Eb7
Abmi
Eb
feel - ing blue
blue

Appendix C

Answer Filed in the United States District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

[TITLE OMITTED IN PRINTING]

1. Denied. This action is not within the scope of Title 17, U.S.C.A.

2. Admitted.

3. Denied. Does not operate and maintain a business for public entertainment, or amusement.

4. Denied. There was no public performance of entertainment for profit.

5. Admitted.

6. Admitted.

7. Admitted.

8. Denied. There were no acts of infringement.

9. Admitted.

10. Denied. Copyright laws were not intended and do not include the playing of a duly licensed radio broadcast.

11. Denied. No injury or damages were sustained by plaintiff and will not therefore suffer irreparable injury in the future.

12. Admitted.

13. Restate answers to allegations in paragraphs "1", "3", "4", and "12".

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Denied. There has been no infringement of plaintiff's protected rights under the copyright laws.

20. Admitted.

21. Denied. Defendant at no time infringed upon rights granted to the plaintiff under the copyright laws.

22. Denied. The plaintiff suffered no injury.

WHEREFORE, defendant prays that this Honorable Court dismiss this action, because of plaintiff's failure to state a cause of action for which relief can be granted under the copyrighted laws Title 17, U.S.C.A.

W. E. Frazier, Jr.
Attorney for Defendant
Suite 210—Carlton House
550 Grant Street
Pittsburgh, Pa. 15219

Appendix D

Notation to the Place in the Certiorari Petition Where Are Printed the Decisions Below and the Judgment Sought to Be Reviewed

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in the petition for writ of certiorari at Appendix A.

The opinion of the United States District Court for the Western District of Pennsylvania is reprinted in the petition for writ of certiorari at Appendix B.

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed is reprinted in the petition for writ of certiorari at Appendix C.

Appendix E

Transcript of the Proceedings at Trial in the United States District Court for the Western District of Pennsylvania

(Pages 17A to 67A)

(1)

Record of Proceedings at the Trial.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

20TH CENTURY MUSIC CORPORATION,

Plaintiff,

v.

GEORGE AIKEN,

Defendant.

72-440 Civil Action

HON. JOSEPH F. WEIS, JR., J.
Pittsburgh, Pennsylvania
10:00 o'clock a.m.
Thursday
February 8, 1973

For the Plaintiff:

WILLIAM M. WYCOFF, JR., Esquire

For the Defendant:

WILLIS E. FRAZIER, JR., Esquire

Mr. Wycoff: Your Honor, before we begin I would like to introduce to you Mr. Corman, who is a member of the Bar of the Southern District of New York and will be at counsel table with me. Also sits at counsel table, Mr.

Finkelstein, general counsel for ASCAP and who will be a witness.

The Court: Thank you, Mr. Wycoff.

Mr. Frazier: Is Mr. Corman going to proceed here with you, are you going to proceed with the case yourself?

Mr. Wycoff: I am proceeding. Preliminarily, before we start, your Honor, if you recall when we met in your (2) office for a pre-trial conference a briefing schedule was established that the briefs were to be due on January 31, Mr. Finkelstein has been out of the country and I called your Clerk and asked if we could have an extension for two days so that he could review the brief and this was agreed to. We then delivered our briefs to Mr. Frazier. However, we did not receive a brief from him until three days after that and it is very clear that his brief is a reply brief to ours, your Honor. I don't believe it reflects the spirit of what we agreed to that we would simultaneously file briefs so I hope that the Court will look at these briefs in that light.

The Court: Whatever the law is, I don't care who files it first.

Mr. Wycoff: Also, your Honor, on Page 7 of Mr. Frazier's brief at the bottom of that page he gives a quote which from the way that it is set up in his brief it would appear that that is a direct quote from Justice Court in the footnote.

The Court: I was going to ask you about that, too, I was curious about that.

Mr. Wycoff: Footnote 2, I believe it is our contention that it is wrong and we will have evidence on that.

The Court: I would be interested in hearing evidence on that point. I wondered where Mr. Nimmer got that (3) information.

Mr. Frazier: Your Honor, in response to Mr. Wycoff's stating he received a brief I received his brief Monday morning and he received mine, sir.

Dennis Wayne Cercone—For Plaintiff—Direct.

The Court: You are both all right on your briefs, I am not concerned about that.

Mr. Frazier: Call Mr. Dennis Cercone, please?

DENNIS WAYNE CERCONE, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Mr. Wycoff: Your Honor, before we begin Mr. Cercone's examination we did arrive at certain stipulations in your office which I would like to make part of the record.

The Court: I think that is very appropriate.

Mr. Wycoff: Mr. Frazier I believe, if you remember, that we did stipulate that the plaintiff, 20th Century Music Corporation, is the copyright proprietor of the song "The More I See You" and Mary Bourne is the copyright owner of "Me and My Shadow", it is a music copy.

Mr. Frazier: I stipulate that.

Mr. Wycoff: We also stipulate that the plaintiff owns and operates "George Aiken's Chicken" which is located at 7th and Liberty and Smithfield Streets in the City of (4) Pittsburgh. We also stipulate that on March 11, 1972, the two musical compositions involved in this action were performed at that establishment over a radio and three loudspeakers.

Mr. Frazier: Your Honor, I think we cited it occurred and you it was performed.

The Court: Three compositions were offered.

Mr. Wycoff: Over a radio and over three loudspeakers.

Mr. Frazier: I don't believe I stipulated that. I stipulated that Mr. Aiken played at his establishment the radio and possibly the tunes were played. I won't argue, I concede that.

The Court: What radio station?

Mr. Wycoff: We agreed that it was Radio Station WJKF-FM and that that radio station was licensed to perform those compositions and you asked that we have a copy of the license here and we do have a copy of that, your Honor.

The Court: Very well.

PLAINTIFF'S CASE IN CHIEF:

Direct Examination by Mr. Wycoff:

Q. Will you state your name, please? A. Dennis Cercone.

Q. Where do you live, Mr. Cercone? (5) A. 419—21st Street, Aliquippa, Pennsylvania.

Q. Are you presently employed? A. Yes, I am.

Q. Where? A. I am employed at the Ivy School of Professional Arts.

Q. Were you engaged on March 11, 1972 by ASCAP to perform an inspection? A. Yes, I was.

Q. What were the terms of your being engaged by them, what were you to do? A. I was to go to George Aiken's restaurant and perform an inspection of the premises which included entering the premises and in a written form describe the exterior, the interior and also the music policy and after this was performed to speak to either the manager or the owner.

Q. And while you were in the establishment did you take any notes? A. Yes, I did, I took written notes of both the description of the interior, the exterior and also I wrote down the musical compositions played that afternoon.

Q. And did you make any sketches of the establishment? A. Yes, I also made a diagram of the building and the interior.

Q. While you were in the establishment did you see

members of the Public enter and purchase food? A. Yes, I did.

(6) Q. And did some of those people sit down and eat the food within the establishment? A. Yes.

Q. During any one time how many people were in or out of the establishment? A. Through the afternoon the minimum amount of people that were in the place at one time was six and I believe the most that were in the restaurant at one time were eight.

Q. And how many employees were in the store? A. As I remember, I believe there were three.

Q. And where were they physically located? A. The majority of the time behind the counter.

Q. I am handing you a document and could you identify what this document is, please (hands paper to witness)? A. Yes, this is the notes that I took on that afternoon and also the sketch of the restaurant.

Mr. Wycoff: I ask that this be marked plaintiff's Exhibit 1. I offer into evidence Plaintiff's Exhibit 1 which is Mr. Cercone's notes and the sketch he made that afternoon.

The Court: Very well.

(Whereupon, said notes and sketch were admitted in evidence as Plaintiff's Exhibit No. 1.)

(7) By Mr. Wycoff:

Q. Mr. Cercone, on this sketch does it show the placement of the three speakers in the establishment? A. Yes, it does.

Q. And would you describe to the Court, please, where all three of those speakers were located? A. I located the three speakers on the ceiling which were over the dining area, in other words, where most of the people were seated.

Dennis Wayne Cercone—For Plaintiff—Cross.

Q. And how many could sit in that dining area? A. I think between 38 and 40, as I recall.

Q. And all three speakers were out in that area? A. Yes, they were.

Q. And you did hear musical compositions performed? A. Yes, I did.

Q. And you heard the two compositions that were involved in this lawsuit performed? A. Yes, I did.

Mr. Wycoff: I have nothing further of this witness.

Cross Examination by Mr. Frazier:

Q. Dennis, what hours were you in there? A. I was in George Aiken's roughly an hour and twenty minutes between four and five o'clock, prior to four o'clock and I (8) think ten after five, as I recall.

Q. At that time you say the maximum patrons were eight? A. At one time in the restaurant, yes.

Q. And at all times there were patrons in the restaurant? A. As I recall, yes.

Q. You say at least six? A. Yes.

Q. Did you make a note of that as to the accuracy? A. Yes, I did.

Q. What time were the six patrons in there? A. I don't understand your question.

Q. At what time did you observe the minimum of six patrons? A. At several different times throughout the afternoon, throughout the hour we were there in the afternoon.

Q. Do you have any notes to that effect or is this just your recollection? A. I recorded at one time there were at least six people.

Q. Do you have the records here in Court with you

today, sir? A. Yes, I do. I have it recorded that there were six people in the restaurant at one time.

Q. At what time? A. I have no specific time marked as to when there were exactly six people in the restaurant.

Q. And you are testifying that the minimum at all times was at least six persons? (9) A. Yes.

Q. Patrons in the restaurant? A. Yes.

Q. And a maximum of eight? A. At one time, yes.

Q. So at all times from the hours of a quarter to five or a little after five, five minutes after five at all times there were definitely six to eight people? A. Yes.

Q. It varied, two people in an hour and fifteen minutes, you say? A. There was a constant flow of people in and out of the restaurant, between six and eight people were there at that time.

Q. There was such a few people, did you time by any chance the time that they remained in the restaurant? A. No, I did not.

Q. Do you have any art background or scientific background as to education?

Mr. Wycoff: Your Honor, I object to that question.

Mr. Frazier: I am trying to qualify him. He presented a sketch here in evidence. I would like to qualify him in evidence.

The Court: The case, as I understand it, it is 99 percent a question of law. I don't want to get held up on (10) qualifications.

Mr. Wycoff: Your Honor, I don't think his qualifications are really relevant at this point.

By Mr. Frazier:

Q. Just one more question, your Honor. With regards to performance, do you understand what I mean by per-

formance? A. You are talking in terms of musical composition.

Q. You said you heard a radio played or you heard it performed? A. I said that I had heard musical compositions performed.

Q. Well, can you distinguish between performed and played over the radio? A. No, I cannot.

Mr. Frazier: There are no more questions.

Mr. Wycoff: You may step down, Mr. Cercone, thank you.

(Witness excused.)

Mr. Wycoff: Mr. Finkelstein?

Mr. Frazier: Your Honor, I would just like to strike the testimony as to performance as a conclusion of law.

The Court: The critical thing is that he heard it and the number of people.

Mr. Wycoff: That is fine, your Honor.

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(11) HERMAN FINKELSTEIN, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Wycoff:

Q. Would you state your name, please? A. Herman Finkelstein.

Q. And where do you live, Mr. Finkelstein? A. Sellersville, Pennsylvania.

Q. And what is your occupation? A. I am a lawyer.

Q. And you are the general counsel of ASCAP? A. I am.

Q. Would you describe briefly, please, your employment history with ASCAP and your involvement?

Mr. Frazier: If it please the Court, I will stipulate as to the qualifications.

Mr. Wycoff: Your Honor, then if we could submit a short resume of Mr. Finkelstein's qualifications in this field (hands papers to defendant's counsel.)

The Court: Does Mr. Frazier care to see it?

Mr. Frazier: I will stipulate as to his qualifications.

Mr. Wycoff: You will accept that as a statement of qualifications?

The Court: Very well, thank you, Mr. Frazier.

(12) By Mr. Wycoff:

Q. Mr. Finkelstein, what is ASCAP? A. ASCAP is an unincorporated membership association consisting of the people who compose music or write the lyrics for musical works and their publishers. It is, in effect, a cooperative, you have the publishers, on the one hand, and the writers on the other. The Board of Directors is composed of one-half writers elected by the writers and one-half publishers elected by the publishers and all royalties that are collected are distributed equally between the writers and publishers, one-half to the writers and one-half to the publishers.

Q. What are the rights that the members grant to the Society?

Mr. Frazier: I will object, your Honor, at this particular time ASCAP is not a party to this lawsuit and we stipulated as to his qualifications. I am not concerned with an issue here as to the licensing agreements. I will stipulate they were licensed but I can't afford any information as to the particular case.

The Court: Objection overruled.

By Mr. Wycoff:

Q. Mr. Finkelstein, what rights do the members grant to the Society? A. The members grant to the Society a non-exclusive right to (13) license non-dramatic public performances of their works for profit. The members reserve all other rights, they reserve dramatic rights, for example, and the right to license non-dramatic performances on their own.

Q. Is ASCAP authorized to bring infringement actions for its members? A. Yes, it is.

Q. And what is that authorization? A. Well, the members in the membership agreement empower the Society to bring suits for infringement occurring by means of non-dramatic public performances, in the names of the members or name of the Society.

Q. And is that one of your functions as general counsel? A. Yes, it is, no suit is brought that isn't approved by me or a lawyer on my staff that I delegate to review it.

Q. And are the plaintiffs in this case members of the Society? A. Yes, they are.

Q. What are your duties as the general counsel of ASCAP? A. I am the legal officer in charge of all legal matters pertaining to the Society. That would involve lawsuits for infringements brought by the Society, it would involve defending suits brought against the Society. For example, being as large an organization as ASCAP is, it naturally had antitrust problems with the Department of Justice and I represented ASCAP in those matters. What is called the (14) Amended Final Judgment entered in 1950 was a consent decree in which the Society agreed that all licenses will be issued at reasonable rates and will be applied in a fair and non-discriminatory manner. Now,

I have an obligation to see that that decree is lived up to and so I review all rates—that is determined by the business end of the Society—before they are presented to the Board of Directors for approval and I have a Society economist review periodically the application of the licensing structure to be sure that the provision that requires the rates being fair and they be uniformly applied is enforced.

Q. Under the consent decree, Mr. Finkelstein, if the licensee is dissatisfied with the rates, what are his rights? A. Under Section 9 of that judgment any user who questions the rates quoted by the Society has the right to apply to the Federal Court for a review of the rates and a determination of a fair rate. The mere application for a license by the user under the decree gives him the license for a 60-day period and if the rate can't be worked out during that 60 days then either the user or ASCAP can apply to the Court for the determination of a fair rate.

The Court: Does the decree limit it to one particular court, Mr. Finkelstein?

(15) A. Yes, sir, the United States District Court for the Southern District of New York in which the decree was entered.

By Mr. Wycoff:

Q. Mr. Finkelstein, at my request did you obtain a copy of the license with Radio Station WJKF-FM? A. Yes, I did.

Q. Could you identify this document, please (hands paper to witness)? A. You have handed me two documents, one the agreement between the Society and Station WJKF-FM, Incorporated, for an FM station having those call letters dated September 12, 1967, expiring on February

29, 1972. And an extension of that agreement dated March 2, 1972, providing for a continuance subject to cancellation on three months' notice.

Q. Is that the original license? A. Those are the original licenses and extension.

Mr. Wycoff: I ask that it be marked Exhibit 2 and offered in evidence. Your Honor, could we substitute a Xerox copy for this and offer it into evidence, do you have any objection?

Q. Mr. Finkelstein, could you please tell us your involvement with the preesnt form of radio license? (16) A. Well, the present form of radio license, the form you have before you, was worked out with the broadcasting industry in a series of conferences in 1941 after the ASCAP music had been off the air for a year because of a dispute with the broadcasting industry. The National Association of Broadcasters and the radio networks in those days appointed a committee to negotiate with ASCAP and the agreement that was ultimately worked out was worked out between me and Robert Myers, who was at that time general counsel for the National Broadcasting Company, that was in 1941.

Q. Mr. Finkelstein, in that agreement in the first full paragraph, fourth line from the bottom of that paragraph, there is a limitation clause which states, "Nothing herein contained shall be construed as authorizing licensees to grant to others any right to reproduce or to perform publicly for profit by any means, method or process whatsoever any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit by any means, method or process whatsoever." Why is that limitation in this license agreement? A. Well, the Society at

that time was licensing on its own the reception of radio broadcasts in public places where there were loudspeakers. And the arrangement worked out with the broadcasting industry was to apply only for the (17) point of broadcast, that is what they were obtained for. Any place picking it up publicly was to make its own arrangements for payment with ASCAP. The only public place apart from the broadcast, itself, covered by the agreement was a studio from which the broadcast emanated and where no admission fee was charged unless if there were an admission fee charged those admission fees went to charity and we agreed under those circumstances that would be included in this license.

Q. What is ASCAP's policy regarding the broadcasting of radio programs over speakers in a commercial establishment?

Mr. Frazier: Pardon me, I will object to that question, your Honor, I can't see it has any particular indication as to ASCAP. This action was brought by 20th Century and Mary Bourne, I am not concerned what ASCAP's procedure is.

Mr. Wycoff: I think we have laid a foundation, your Honor, that these two plaintiffs are members of ASCAP and ASCAP their licensee.

Mr. Frazier: I am not concerned about their relationship with other divisions, I am concerned about their contract rights with this particular division.

The Court: Objection overruled.

By Mr. Wycoff:

Q. The question, Mr. Finkelstein, what is ASCAP's policy (18) regarding the broadcasting of a radio program over loudspeakers in a commercial establishment such as George Aiken's here? A. The Society has this policy that if the establishment has nothing more than a home receiving set the Society makes no charge for that performance

but if loudspeakers are employed then that gets into the area where the Society has a very substantial licensing operation. For example in this licensing of Muzak and similar organizations that is entirely on the basis of loudspeakers; and about over 75,000 establishments are licensed on that basis, and that involves revenue of over $2,100,000.00 a year to the Society for its members. If the Society were not to enforce its right with respect to loudspeakers Muzak would stop paying. There are over 5,000 places that the Society licenses directly and, by the way, the license fee for this kind of use is the lowest or minimum license fee for the Society has, $5.00 a month or $60.00 a year. Now, that has been a part of the Society's operation as long as I remember. Certainly it was in 1941 and has been since that time.

Q. All right, now, are ASCAP's policies as to charging the license fee for the broadcasting over loudspeakers applied uniformly throughout the United States? A. Yes, the policy is applied uniformly.

Q. And is it your obligation as general counsel to see that (19) this is so? A. It is.

Q. And is it? A. I have reviewed it and it is reviewed periodically and the policy is applied and is applied uniformly.

Q. All right, and do you license throughout the country establishments such as George Aiken's Chicken? A. The Society does.

Q. Do you license in the Pittsburgh area such establishments? A. Yes, sir.

Q. How many establishments have you licensed that use radio over loudspeakers? A. Directly a little over 5,100.

Q. And what is the value of these licenses? A. A little over $246,000.00.

Q. And I believe you did testify to that, I am sorry if I am being redundant but how long has the Society been

licensing such establishments for such performances? A. It came to my attention in 1941 in working out the radio agreement. I don't know how long it was in effect before that but it has been since that time down to this date.

Q. And have you licensed large chain stores for the broadcasting of music? A. Oh, yes, definitely.

Q. Are there any current proposals regarding the change of (20) copyright laws which would affect what you have talked about today before Congress? A. Yes, there was a bill which passed the House. Copyright revision, by the way, has been the subject before Congress for quite some time because the copyright law was enacted in 1909. Congress made an appropriation in 1956 for a study of a revision of the law and a number of bills have been introduced. The first one to pass the House was passed in 1967 which is H.R. 2512 and Section 110, Subdivision 5 of that bill provides that there shall be liability for performances, that there shall be an exemption of places that use just an ordinary home receiving set but there will be liability if they make a further use. We felt that, both ASCAP and BMI—

Mr. Frazier: Pardon me, I object to this testimony as to the bill unless he has a copy of the bill.

A. I do have a copy.

Mr. Frazier: Would you present it in evidence?

A. Yes, if you would hand me an excerpt at least from HR 2512 and then if I can have that folder that you have there. Hand me the papers that were under there, too, because I think they have everything that may be pertinent here.

Mr. Frazier: Your Honor, I would like to object to his testimony that this wasn't in his particular

pre-trial (21) brief and I wasn't aware to look into this and I object to the testimony.

The Court: Objection overruled.

The Witness: There is a copyright bill on the desk I think, I am not sure of the number at the moment. That is it, thank you.

By Mr. Wycoff:

Q. Well, Mr. Finkelstein, what you were testifying about is contained in that draft of the new copyright bill? A. Yes, I have the form of the section, HR 2512 and Section 110.

Q. And that has been passed by the House? A. Yes, that was passed by the House in 1967.

Q. And is presently before the Senate? A. Not that bill because at that time it was adjourned but corresponding bills have been introduced and have been before the Senate Committee since that time. They all contain that provision.

Q. And specifically it would write in to statutory law that the broadcasts for radio over loudspeakers would require the users to get a license? A. Well, I would rather refer to the provision, itself, Section 110(5) provides this, you might check me on that, "Notwithstanding the provisions of Section 106 the following are not infringements of copyrights." Then you (22) would have to go back to Section 106 that provides the exclusive rights and on the copyrighted work subject to 107 to 116 the owner of a copyright under this title has the exclusive right to do and authorize any of the following. And then you get down to subdivision 4 which says:

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures

and other audio-visual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomines, and pictorial, graphic, or sculptural works, to display the copyrighted work publicly."

Mr. Frazier: (Interposing) Your Honor, I would like to object again. This is very hard to follow, this line of testimony. Wait a minute, I think you have submitted this in your trial brief.

The Court: Objection overruled, I want to hear the background of the problem as to what I think is all relevant. Objection overruled.

A. (Continuing) Then, your Honor, Section 110, Subdivision 5 carves out an exception. It reads this way, "Notwithstanding the provisions of Section 106 the following are not infringements of copyrights" and we get down to Subdivision 5.

Mr. Frazier: Your Honor, if he is going to read this I would like to see what the infringements are, what are not infringements are to clarify this. If he is testifying (23) to the whole thing I want a complete unbiased opinion. Could you read out the non-infringements?

A. Yes.

By Mr. Wycoff:

Q. I guess you would read Paragraphs 1, 2, 3, 4 and 5, if you would, please. A. Section 110 has a caption, "Limitations on Exclusive Rights. Exemption of certain performances and displays." By the way, I am reading from HR 4347 which I am quite sure is identical with HR 2512.

We had bter just be sure, I don't have HR 2512 before me at the roment.

Q. I beleve I just handed that to the Judge, is this what you re referring to? A. I would just like to check and see wether it is the same as the one I have before me, which s HR 4347.

M. Frazier: Your Honor, I would still like an objetion, I am surprised at this form of testimony. I ar not competent to countermand and make my objetions and I definitely feel that this should have been in his trial memorandum.

The Court: Objection overruled, it is a question of law, Mr. Frazier.

M. Wycoff: The Judge did ask specific questions at our pre-trial conference.

(2) Mr. Frazier: I thought all we were concerned about are the license and I stipulated to that effec.

By Mr. Wycoff:

Q. Woul you proceed, please? A. I am reading from HR2512. It says, "Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audio-visual work, he performance is given by means of a copy that was not lawfully made under this title and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work, or display of a work, by or in the course of a transmission by a governmental body or other nonprofit organization." Now, I am going to skip the rest of that provision because I don't think that is involved here—after "governmental body or nonprofit organization," I will go down to No. 3:

"(3) performance of a nondramatic literary or musical work or of a dramatico—musical work of a religious nature, or display of a work, in the course of services at a place of (25) worship or other religious assembly."

"(4) performance of nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions"

And I think we can skip those conditions because that doesn't apply here. Then we get down to the fifth and last subdivision of Section 110.

"(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless . . ."

The Court: Now, in the bill that you are reading does it say single radio receiving apparatus?

A. This bill I have here has single receiving apparatus.

The Court: You put the word "radio" in.

(26) A. Oh, did I? I am sorry, continuing to read from "a single receiving apparatus of a kind commonly used in private homes unless"—

"(A) a direct charge is made to see or hear the transmission." That, of course, is not our case or,

"(B) the transmission thus received . . ." [received on that single receiving apparatus] is further transmitted to the public. And of course here that was further transmitted to the public by these loudspeakers.

By Mr. Wycoff:

Q. Mr. Finkelstein, does that provision, Sub-Section 5, conform to the existing ASCAP policy? A. Yes, it does.

The Court: How does that fit in with the [illegible] that the Supreme Court had on the TV?

A. Park case, your Honor?

The Court: Yes, would there be any direct conflict with that?

A. Well, of course, the Fortnightly case involved cable television and cable television is governed by the section of 111 of HR 2512.

The Court: This does not purport to cover television communication then, cable television in it does not, that is, cable television as distinguished from television broadcasts which are just radio broadcasts? Section 25 (27) applies to the customer TV reception but not to cable.

A. Not for cable, that is right. There is a separate section on that, Section 111 did provide for cable television and on the House floor that was taken out of the bill but Section 111 was restored with changes in the bill before the Senate. As the bill passed the House cable television would have absolute liability but it is understood they would work that out.

Mr. Frazier: Pardon me one second, what is the date of this particular bill?

A. The one that I am reading from is dated February 4, introduced February 4, 1965, and reported out October 12, 1966.

Mr. Frazier: It is before the Fortnightly decision?

A. The one his Honor has before him, HR 2512, is 1967.

Mr. Frazier: Still before the Fortnightly decision?

A. Oh, yes, and there have been bills since the Fortnightly decision but the one that passed the House—

Mr. Frazier: Do you have those?

A. I believe I do.

By Mr. Wycoff:

Q. Well, on cross examination we will get them at that time. Mr. Finkelstein, I am not sure that you are familiar with the Footnote 204 that appears in Nimmer, that is reproduced (28) in the defendant's trial brief, I would ask you if you would read that to yourself for a moment, please (hands paper to witness)? A. (Witness reads silently). I have that.

Q. Will you state to the Court, please, whether that footnote reflects what, in fact, is the true practice of ASCAP? A. It does not. I think I can see how Mr. Nimmer went wrong but it does not reflect the practice of ASCAP or as I use it.

Q. But as to ASCAP would you state once again what the practice of ASCAP is? A. The practice of ASCAP is to enforce the rights under the copyright law wherever there are loud speakers but not to enforce those rights where the reception is by means of an ordinary home set and the way that came about was that there was a small amount of Momma and Poppa places, stores where they had an ordinary home receiving set to keep them occupied during the day and the Society felt, the Society has adopted a policy of not enforcing the rights even though they existed against that kind of use of the musical works in the repertory of the Society. However, at the point of the installation of loud speakers that was the kind of use that the Society was enforcing generally. Now, even with not applying this policy to receiving sets the Society had many complaints from such organizations as (29) Muzak which contended that if the Society didn't grant this exception that Muzak would be able to sell these people the Muzak services because the Society's rate has been the minimum rate, is $60.00 a year. If Muzak installed the Muzak operation they would have that $60.00 to work with right away but the Society felt that notwith-

standing the complaints of the Muzak people that in enforcing the rights of its members it was reasonable not to insist on payment by the Momma and Poppa type of operation where they just used the home set.

Q. Now, Mr. Finkelstein, as general counsel for ASCAP do you have an opinion as to whether the Fortnightly case did overrule Bucks with respect to the licensing of an operation such as George Aiken's Chicken which does broadcast radio over or through loudspeakers, three loudspeakers?

Mr. Frazier: I object to that as a conclusion of law and strictly presented here by the evidence to present this side of the picture and I don't attach much relevancy to it.

The Court: Well, it is his opinion, of course. I will permit it, it is still my decision.

A. In Fortnightly the Supreme Court had before it a new industry that wasn't in existence at the time of Buck and Jewell-LaSalle and at that time the question was whether the Doctrine of Buck and Jewell-LaSalle would be extended to (30) this new industry which as counsel for the cable television people pointed out in that case would involve this industry in millions of dollars of copyright infringement liability and might choke off this industry before it got moving. The Supreme Court took that into consideration as the opinion states and decided that it would limit Buck and Jewell-LaSalle to its facts, I suppose somewhat as in the Flood baseball case that went before the Supreme Court recently.

The Court: Well, they said that the remedy in Buck and Jewell-LaSalle was the tax, just what did they mean by that? The hotel with the radio being played in each room by one of these little knobs?

Mr. Wycoff: I think the Court noted that it was also in the dining rooms and Public hotel.

A. I think, basically, the question certified to the Supreme Court in the case of Buck and Jewell-LaSalle was whether there was a performance, both at the radio station where the performance was initiated and at the hotel. It was contended that there could be only one performance and that that performance occurred, if there was a performance, that that performance occurred at the point of the broadcast initiation. Now, in the Jewell-LaSalle case the broadcasting station was not licensed and the hotel was not licensed, just to get all the differences, but the Court held (31) that that was a performance both at the point of the radio origination and at the hotel. Now, the Supreme Court in Fortnightly held that what the cable television people did, what the Fortnightly people did, was not a performance; that when a person in his home turns on and activates a radio, a television set, that was not a performance and that what the cable television people did in enabling the performance to get to the home was more like what the person at home did than it was like what the broadcaster did and broadcasting had been held, of course, to be a performance. Now, the question before the Court was on what side of the line should they put cable television and they were confronted with Buck and Jewell-LaSalle which applied to the reception and the reproduction of a radio broadcast and the Court said that it found that in this new industry, which it was when it took off, they held it would not find that that was not a performance by cable television but it did not overrule Buck and Jewell-LaSalle. Now, we have here a radio broadcast that was licensed initially but the license provides that that shall not give any receiver of that broadcast the right to reproduce that pub-

licly for profit. There was no such limitation in the Jewell-LaSalle case because, of course, there wasn't a license. The original broadcast, there couldn't have been a limitation but there had been this case of Buck v. De Baum (32) where the Court implied a license to reproduce publicly at the point of reception. There was a provision thereafter inserted, one that I worked on myself for the radio broadcasting license agreement that negatives any possible implied license after that.

Q. That is the clause which you have read and discussed earlier in your testimony? A. That is correct.

Mr. Frazier: Will you refresh my memory as to that clause?

The Court: The first paragraph of the licensing agreement.

A. That came up, I believe that issue came up in the SESAC Society of European Stage Authors and Composers against New York Statler Hotel. I think Judge Woolsey held that these are separate performance. He said that they wouldn't have an implied license, anyway, but that the provision in the agreement negatives the possibility of any implication of a license.

Mr. Wycoff: Your Honor, I know it is a little unorthodox, I would ask that if you do have any other question regarding the Fortnightly case since he did appear and argue the case in the Second Circuit and argued it before the Supreme Court—

The Court: (Interposing) I gathered that was Mr. Nimmer's analysis of the case.

(33) Mr. Wycoff: He kept the footnotes just the way the Court quoted. I talked to him about it.

The Court: Anything further?

Herman Finkelstein—for Plaintiff—Cross.

By Mr. Wycoff:

Q. Just to go back for a moment, Mr. Finkelstein, in the 1950's way before the Fortnightly case did the Society enter into a direct license agreement with retail establishments that broadcast radio over loudspeakers? A. Oh, yes, many of them.

Q. Can you give us an example? A. Well, I, personally, participated in the one with the Kroger Stores back in 1957. There have been others, the Thrifty Drugs and, oh, many of them and these were broadcasts of radio over loudspeakers and their individual license. I pointed out before there were over 5,100 individuals licensed by the Society.

Q. One point I failed to bring out earlier in your testimony, would you state what is the right of a composer to license his own work? A. The author reserves the right to license independently so that if he and the users would work out their own arrangements that would not go through the Society at all.

Q. So for Mr. Aiken to use this music in his store he could go directly to musical composers and enter into a license (34) with them to use their music? A. By all means.

Mr. Wycoff: I have nothing further, Mr. Finkelstein.

The Court: Mr. Frazier?

Cross Examination by Mr. Frazier:

Q. You mentioned Kroger Stores? A. Yes, I did.

Q. Did they play on regular programs or did they play tapes, what sort of program did they play? A. Radio.

Q. Just a plain radio with commercials? A. Just the way that it was broadcast, yes.

Q. They don't beep on any commercial? A. No, that was not a beeping operation. We do have such licenses but that wasn't Kroger. When they operate the beep ASCAP licenses the supplier of the music, that is like Muzak.

Q. So Kroger just played ordinary regular broadcasts? A. Yes.

Q. Where they might even give a commercial? A. Oh, yes, surely, anything that came over the air. So his Honor understands that beeping operation, you can use what they call a beeper to beep out or nullify the commercials (35) so they are not heard and the Kroger operation did not involve a beeping operation but, rather, involved just the ordinary radio reception as in this case.

Q. So they were not restricted in any way whatsoever as to what they could play? A. Oh, no, you mean, if it was radio?

Q. Were Krogers allowed to play records? A. Oh, yes.

Q. Were they allowed to play tapes? A. Yes, anybody that has a license to perform by means of radio also has a license to perform by means of records or tapes, that is the standard form of license because the minimum rate of $60.00 a year gives permission to do all those three things.

Q. Can you testify on information as to the type of broadcasts which Krogers utilized? A. Oh, yes, I knew at that time, yes, it was the regular reception.

Q. Do you know what particular stations they were? A. I did know at that time.

Q. But they were not restricted as to radio broadcasts, is that right? A. Oh, no, there is no restriction. In every contract the Society enters into the use can be radio for that kind, for the $60.00 radio, the use can be radio, record or tapes.

(36) Q. Another question with regards to the home receiving set? A. Yes.

Q. Would this new advance in technology which you

state where there is more than one speaker radio today? A. We are talking about the ordinary home receiving set without loudspeakers and, by the way, the bill HR 2512 distinguishes between the ordinary. It was a common use or some phrase like that, just a moment, I will tell you. A single receiving apparatus of the kind commonly used in private homes, not just anyone but the kinds commonly used.

Q. That is in 1967, five years ago? A. That is right.

Q. Yes, would you take note of the fact that radio has been built today, FM? A. Radio with several speakers.

> Mr. Wycoff: Excuse me, are you saying several speakers in the radio apparatus, itself, or are you talking about external speakers?
>
> Mr. Frazier: Either external or internal.
>
> Mr. Wycoff: In the ceiling? The idea is I am just trying to know whether the radio reception sets today for FM have several speakers.

A. I don't know how the set was constructed and ASCAP would draw no distinction if it was the set commonly used in the home and that was the kind of thing used in the establish- (37) ment. ASCAP would not endeavor to charge a license fee for that use but at the point of separate loudspeakers away from the set, itself.

By Mr. Frazier:

Q. As to this bill did ASCAP have a lobbyist present, an enforcer to more or less inform the lawmakers as to how they felt about it? A. I appeared before the committee, myself.

Q. Thank you, you testified as to the uniformity of the practice of ASCAP, how do they proceed, with unauthor-

ized, do they tend to litigate like unauthorized practices on the part of their licensees? A. You mean, what we regard as infringements?

Mr. Wycoff: Your Honor, excuse me, I object to that question, I don't understand it.

By Mr. Frazier:

Q. Well, maybe I will reword it. Did ASCAP at any time bring action against or revoke licenses for improper uses of their licensees? A. I am sorry, I don't understand the question?

Mr. Wycoff: Also, your Honor, I don't believe it is relevant.

Mr. Frazier: He testified uniformly more or less as (38) a universal policy.

Mr. Stitt: Your Honor, may I ask to have a conference with counsel for a moment?

By Mr. Frazier:

Q. What is their policy as to the other so-called competitors if a party is licensed by one of your competitors, I mean, do you have an agreement to leave them alone or else you enforce? A. Oh, no, ASCAP licenses the use of its repertories and the other licensing organizations license the use of their repertories. These are separate repertories.

Q. Everybody is subject to one license, you cannot offer them a universal license? A. ASCAP just offers them a license for its repertory.

Q. Well, then, BMI or other organizations can enforce their licensing on all of your members, is that right? A. Not that, our members may or may not be informed of

businesses that perform. You probably don't mean licensing, do you?

Q. I probably do but I am just trying to say that you cannot offer uniform licensing, the other organizations similar to yours are competitors if somebody subscribes to their membership, do you leave them alone or do you proceed with them to have them engage your particular services also?

(39) Mr. Wycoff: Excuse me, your Honor, I object to this line of testimony. I don't see where it is leading and I don't see how it has anything to do with what we were discussing on direct examination or what bearing what ASCAP's competitors do in this particular case in this infringement.

The Court: Objection overruled, background information.

A. We don't know anything about specific places where, BMI or SESAC, the other two licensing organizations, have licenses; nor is it a matter of any concern to us. We wouldn't know what they do in terms of specific licensing. I know their policies pretty much.

By Mr. Frazier:

Q. What is your problem with people concerning people who are BMI members? A. I don't understand the question because ASCAP can only represent the music of those people, writers and publishers who are its members.

Q. Do you have uniform control of every publisher that holds out music, do you control each and every one of them, do you have in your repertory every publication of music? A. You mean, throughout the world?

Q. Right. A. Oh, no.

Herman Finkelstein—for Plaintiff—Cross.

(40) Q. This is what I am trying to say, what is your policy in regard to people who have signed up with these other organizations other than yourself, what is your policy as to people who have licensing in other organizations?

Mr. Wycoff: Mr. Frazier, excuse me, is your question what is ASCAP's policy if a commercial establishment has a BMI license but they are also using our music?

By Mr. Frazier:

Q. What is your policy as to competitors who have one of your competitor's licenses? A. I think I understand what you are trying to get at. Let me see if I can state that. I think your question is, first, to put it in its simplest terms, is there any relationship whatsoever between ASCAP and the other licensing organizations and the answer to that would be no. And then would ASCAP know or be concerned with the question of whether a particular establishment has a SESAC license or BMI license and there again the answer to that would be no. BMI or SESAC, the answer to that would be no. I wonder if that answers your question?

Q. What I am trying to say is that any of these establishments are subject to suits such as Mr. Aiken here if they happen to play a BMI number or SESAC number then they can be brought into Court here today just as Mr. Aiken? (41) A. Oh, yes, true, if they infringe any number, be it ASCAP, BMI or SESAC, they can be brought into Court but as a practical matter a given user decides for himself what he thinks he needs.

Q. He is subject to lawsuit, you can't offer universal coverage, do you have any agrement with BMI? A. No. By the way, I hesitated there because I thought you hadn't finished your question.

Q. When I say "agreement" I mean any relationship, business relationship or something that relates to business directly? A. None whatsoever.

Q. What percentage of the published music do you control? A. That is awfully hard to say. We have no occasion to make that kind of an analysis because music that is published without being performed would have no relevance.

Q. As to published music, I mean, you do have some competitors, they probably have some tunes that are also published? A. Oh, surely.

Q. What is your percentage? A. It would depend on the use by a particular user. Some users will perform much more ASCAP music than it performs others. Other users will perform much less.

Q. You are talking about radio stations? A. Whether it be radio or anything else. Now, you have symphony orchestras.

(42) Q. We are just discussing radio broadcasts. A. That would depend on the radio station, what they call the top 40 stations have a different form from stations such as WQXR, the so-called good music station in New York.

Q. Mr. Aiken and other establishments which have licensing agreements with ASCAP, they are still subject to other organizations such as yours, would that be right? A. The answer to that would be yes if they performed the work from those other repertories.

Q. Thank you. I think you mentioned when you gave your description that cable TV was in its infancy when the Court made its decision, is that right? A. Yes, sir.

Q. Would you consider an excess of two million subscribers as an infancy organization with $150,000,000.00 worth of revenue a year an infancy organization? A. The answer to that is yes in the case of cable television.

Q. Well, no, I just asked you as to its infancy? A. Well,

the answer is that it is still in its infancy, it is becoming a very healthy infant. I think it is still in its infancy.

Q. How much business does ASCAP do a year? A. Well, ASCAP's gross is about $70,000,000.00 a year.

Q. So a company that does in excess of $150,000,000 is in its infancy in your organization and has been in being for how (43) long, sir? A. Oh, since 1914.

Q. And so you would still like to indicate that a company that does twice the business you do is still in its infancy even if it has been in business since 1914? A. Yes, I think I know enough about cable television, yes, it is in its infancy. In some large cities cable television hasn't entered at all. In New York City it really hasn't gotten a major start. I don't think Philadelphia has cable television yet so I think ultimately, that this is just my own opinion, I think cable television will supersede television as we now know it.

Q. Would you say that ASCAP is more or less just beginning if they are liable to come in and license fast food franchises? Anybody that plays the radio for the public that has in excess of one speaker, would you say that ASCAP is in its infancy, also? A. No, I would say that ASCAP is quite mature.

Q. As to potential licensees, anybody that plays a radio with in excess of one speaker is subject to a licesing agreement with you people, is that right? A. Oh, yes, but you will find that for the most part when they start putting loudspeakers in the establishment and that is an extensive setup and they are going to think at that time shall they go along with Muzak or one of those types of (44) organization that Muzak will make their installation for them and all that or shall they pay, you know, a very nominal copyright royalty considering that you are getting the music of Bert Bachrach—

Q. Well—

Mr. Wycoff (Interposing): Mr. Frazier, please let the witness finish his answer to your question.

A. (Continuing) For this $60.00 they get all the music of people like Bert Bachrach, Irving Berlin, the Cole Porter repertory, Rodgers & Hammerstein, the Gershwin music. Cy Coleman, some of the other things, symphonic writers, whatever there is, not all of these but all these writers their works are available for only $5.00 a month. I would say that is the biggest bargain that there is in the American musical world.

Q. Don't you think they have a feeling maybe it is unjust enrichment but the fact is that the real commercials go right along with it and the one who is performing is also paying a fee. A. Well, you see radio is in the same position in music. The amount charged for each performance is so small that it just isn't feasible for a broadcaster or for anybody else that makes a great use of music to have separate licenses for each individual work and as ASCAP exists both for the convenience of its members because they couldn't (45) afford to check on uses or to negotiate for separate uses, and for the user who makes a multiple use and just needs some vehicle through which to acquire these rights. Now, ASCAP makes all these rights available, they can't say to the broadcaster, "When you buy a license from ASCAP you have to buy not only a license for what you do, sending these musical sound waves out, but also for any place that might pick it up." We can't say that, we can't impose upon them an obligation to pay for something the law doesn't compel them to acquire.

Q. Would you repeat that again, please? A. I say we can't insist that the broadcaster or any users buy a license that the law doesn't require them to buy considering what they do. And when the broadcaster broadcasts he doesn't need a separate license for the performance in the

homes because that is private. But when a recipient of the broadcast puts it out over loudspeakers to the Public, if the broadcaster had to buy the right to authorize that at the receiving end the broadcaster would have to pay for that, he wouldn't get it for nothing and it isn't paid for at that end now.

Q. Do you think that ASCAP should impose upon them some kind of restrictions or some kind of warning in the broadcasters that any reproduction of this broadcast not authorized is strictly prohibited? (46) A. That would be a terrible interference, wouldn't it, if every time you turned on your radio set in the home because you couldn't beep it out of the home if you always had to hear that an unauthorized public performance is prohibited every time they change the program, I think that would be a terrible interference with what the American Public is in the habit of receiving. The commercial announcements are bad enough interference as it is.

Q. Do you feel that the legislatures who enacted this law copyrighted all the music publications as a right strictly imposed upon the publication that is copyrighted and protected? A. I am afraid I don't understand your question?

Q. Do you think that the Legislature when they enacted this legislation at that time I think it was mainly for music published, music that they indicated that it should be presented on their particular music transcript, that it is copyrighted? A. Quite the contrary, a record does not require a copyright notice on it for part of the work recorded, the musical composition, unlike sheet music, a record doesn't nor does a performance require it under the law.

Q. I believe in the sports presentations they indicate that any unauthorized user, this is prohibited, is that right? A. Yes, because it is not copyrighted and they want to be sure (47) that they preserve their rights.

Herman Finkelstein—for Plaintiff—Cross.

Q. Do you think the copyright people have the right to protect themselves, also? A. Oh, I think that they have the right and I think that the law grants it without the necessity of any further statement.

Q. They don't have to put some kind of infringer on notice that he is infringing? A. That notice is provided for in the law and the law provides that every published copy of the work must contain a copyright notice, the year of publication, which is the year of the copyright and the name of the copyright owner. That is required on the publication, the physical copy but not on anything other than the physical copy or in any other way, not even on phonograph records. They are not considered a copy.

Q. The phonograph records have already paid their licensing agreement, is that right? A. The phonograph manufacturer pays for only what the law requires him to pay, that is the right to make the record, itself. Once a single recording is authorized the maximum rate that can be charged is two cents to any other record manufacturer. That was in the 1909 law. And otherwise, it gives the recording manufacturer the right once the copyright owner has authorized any manufacturer to (48) record the work, any other manufacturers may record that work on paying two cents to the copyright owner. Then it says that the payment of the two cent royalty shall not free the work from an obligation to pay for public performances of the work.

Q. So then the radio broadcaster which is made pays for the performance, is that right? A. Yes.

Q. They pay for the performance, is that right? A. Yes.

Q. They are performers? In regards to the first-nighter situation, how did they refer to the Buck v. Jewell case?

Mr. Wycoff: Do you mean Fortnightly?

Mr. Frazier: Right.

A. Oh, I think that is a matter of record. We can look at the opinion, itself, of course, to find that out.

By Mr. Frazier:

Q. You testified before as to the contents, how did they refer to it? A. I think you are asking for the precise language and I think I have a copy of the Fortnightly opinion here.

Mr. Wycoff: I would object to the question. He is asking as to precisely the opinion.

(49) The Court: You may ask him his opinion.

Mr. Frazier:

Q. When they made the statement it was a questionable 25-year old decision, what is your opinion on that?

Mr. Wycoff: What is the questionable 25-year old opinion, would you state that, please?

A. Well, the facts before that Court were on whether the cable television, whether the doctrine of Buck v. Jewell-LaSalle should be applied to the cable television situation, the Court did make a statement about that case being a questionable authority or some words to that effect.

Q. A questionable 35-year old decision, is that right? A. I think there is something to that effect in the majority opinion.

Q. And they did state that it was not a performance on the part of the cable television? A. By cable television.

Q. And did they draw a line between a broadcaster and a viewer and with all the instrumentalities on the part of the cable TV they still held that the cable TV suppliers to homes for a profit and still were a viewer and not a broadcaster? A. They said it was more nearly like the viewer than the broadcaster and, of course, Justice Fortas showed

that it was quite an immaterial statement to be put in the opinion.

Q. What else did Mr. Fortas have to say?

(50) Mr. Wycoff: I object to that again, you are asking him for specific language. You may ask him an opinion.

The Court: Too broad a question.

By Mr. Frazier:

Q. What is your opinion of Mr. Fortas' decision? A. It was just a dissent, I accept it as a dissent.

Q. As a dissent? One more, you as an expert in this particular field, what is your opinion of Nimmer? A. Oh, I think Nimmer is a very bright man. He teaches an excellent course in copyright and I have lectured in his class and he is a good friend of mine. I think he is wrong in that footnote quoted by the Court. I know he is wrong, I still have a high opinion of him.

Q. Do you think it is right? A. No, I think he isn't informed. I don't know to what extent he prepared the statement he published or that was published with his authority. I would say he is wrong, I know he is wrong because he is quoting a practice that I know is a misstatement of what is the practice because I was there and he wasn't.

Q. And maybe that you are employed by ASCAP and he is an individual independent offering an independent service?

Mr. Wycoff: Is that an argument or a question?

Mr. Frazier: No more questions.

(51) The Court: Mr. Finkelstein, I think when Mr. Frazier was referring to the number of radio sets which are sold in the form of components, for example, you buy your separate speakers does ASCAP feel that sort of radio in distribution would

fall within the definition of a separate type of loudspeaker?

A. Is your Honor referring to those complicated stereophonic reception devices?

The Court: You may buy three or four speaker units, for example, in a little cabinet type and spot them around the room, put them around the room.

A. I would say that if that is done in a Public place that they don't have the type of set that you commonly see in a home. The common thing in a home is just the set, itself but many homes can afford to have these separate speakers but the kind of thing that we have not been making a charge for is the ordinary commonly used home receiving set. Of course, in the home that is a private performance.

The Court: Suppose that Mr. Aiken in this case instead of having three speakers in the ceiling decided to have three little home receiving units spotted throughout the store, what is your position on that?

A. We haven't run up against that, we have never seen that. We would probably decide that the policy of the single set ought not to be applied to that situation but we haven't (52) come up against that and, by the way, the bill that went through the House talks about a single receiving set, doesn't it? I think the Congress had that in mind.

The Court: On a single receiving apparatus.

A. Yes, and they intend to limit it to just one set and it just applies to that set, the kind of thing when it says commonly used in the home to emphasize the thing and not

somebody who can afford it and wires his whole home and not that kind of thing.

The Court: Very well, thank you.

The Witness: Thank you.

(Witness excused.)

Mr. Wycoff: Just one moment. We have nothing further, your Honor.

PLAINTIFF RESTS

Mr. Frazier: Do you rest your case?

Mr. Wycoff: Yes.

Mr. Frazier: If that is the case may I make a motion for a directed verdict?

The Court: I don't think a directed verdict would be appropriate in this type of case. I will hear all the evidence and then the law from your briefs.

(53) DEFENDANT'S CASE IN CHIEF:

Mr. Frazier: Your Honor, may I cite my reasons for a directed verdict at this time?

The Court: I am going to refuse it because I have heard the question as I see it under the evidence does the Buck and Jewell-LaSalle case apply or does the Fortnightly case apply.

Mr. Frazier: Mr. Aiken, please?

GEORGE AIKEN, called and sworn as a witness in his own behalf testified as follows:

Direct Examination by Mr. Frazier:

Q. Would you state your name for the Court, please? A. George Aiken.

George Aiken—For Defendant—Direct.

Q. Mr. Aiken, you are named as a defendant in this case as the proprietor of a fast food service, is that right? A. Yes, sir.

Q. Could you briefly describe to the Court your operation, what it consists of?

Mr. Wycoff: Excuse me, your Honor, based on the stipulations that we have I don't know if this testimony is relevant to any issue in the case.

The Court: Objection overruled.

(54) A. Well, we are primarily these people say restaurant but it is primarily a delicatessen operation. I think anybody who has been in our stores can attest to that and for years we have been playing music in the store primarily for the enjoyment of the employees. The thing so far as speakers in the ceiling and that came about primarily I believe through the development of this transistor system and it lowers the prices and for years we did play strictly through radio. And we found at this time most of the time you have to put the radio somewhere behind the counter and this interfered with the employees in their conversation with the customers. And you speak of speakers in the ceiling and we put those in the ceiling with the intent that we do have the music and we do have it strictly for the employees because I would say 40 percent of the time during the time we are open at nine o'clock in the morning until six o'clock in the afternoon there are no customers in the store. It is usually during lunchtime or evening when they are taking food home. The boy that is in the store, Dennis, I don't think he saw the receiving set. There are two speakers. If he would look further he would also see a speaker in the kitchen, in the office and the girls' wash room so we do concern ourselves with the employees. The speakers in the ceiling, like I said, were primarily to take the near effect of the radio blaring in (55) the employees'

ears away. We don't primarily play any particular radio station. We play one that doesn't play a wild type of thing because I think it works against the customer and employee relationship but we do also pick up all the commercial news broadcasts or whatever comes over the radio. I don't know how the law reads on this. If the law says that is the case it is the case but somebody coming around just for a shakedown then this I bitterly contest.

Q. Mr. Aiken, do you turn off your radio when business is slow and there is nobody in the store? A. My radio comes on the moment the employees start.

Q. No, if there are no patrons or no customers in the store which at times happens you still continue to play the radio? A. Why certainly.

Q. Mr. Aiken, what is the average time a person stays in your store? A. Pickup customers, which are 60 percent of the business, is maybe two, three or four minutes, five at the most, a sitdown customer and they have to carry their food to the table, we don't supply waitresses and it is all on disposable paper, that person isn't in there generally more than ten to fifteen minutes at the very most.

Q. Mr. Aiken, what do you charge for a cup of coffee? (56) A. Ten cents.

Q. Do you think that your food is being undersold anywhere in town?

Mr. Wycoff: Your Honor, I object to that as having absolutely no relevance to this case whatsoever.

Mr. Frazier: I think it does under your case law.

The Court: The objection is overruled.

A. I think we aren't the cheapest in town, there are some much cheaper.

Mr. Frazier: I have no more questions.

George Aiken—For Defendant—Cross.
George Aiken—For Defendant—Recross.

Cross Examination by Mr. Wycoff:

Q. Mr. Aiken, you do not deny, however, that there are three speakers that are in the ceiling out in the Public part where the Public sits? A. Two speakers.

Q. You say there are only two? A. Yes.

Q. May we have Plaintiff's Exhibit 1? In the 7th Avenue and Liberty Avenue store this was the drawing that was put into evidence earlier by Mr. Cercone stating that there are speakers? A. This one.

Q. Which is not there? (57) A. This one right there.

Q. You say there are two speakers? A. Yes.

Q. They are audible to the employees? A. Yes.

Q. And the employees most of the time are behind the counter, aren't they? A. You can't put a speaker over an employee's head, if I were to put speakers they wouldn't hear the customer, No. 1.

Q. If the speaker is lower than the barrier there they can only hear these speakers? A. The employees, you mean?

Q. Yes, behind the counter back here. A. Fine, you go in one of my stores and turn the radio off I would probably have them walking off on me.

Redirect Examination by Mr. Frazier:

Q. Mr. Aiken, he submitted this in evidence, you indicate there are two speakers here? A. Yes.

Q. How many speakers do you have in the store? A. Five, one is in the kitchen, one is in the office and one is in the wash room.

(58) Recross Examination by Mr. Wycoff:

Q. Your position is that the speakers keep your employees happy? A. Certainly.

Q. If they are happy do they work more efficiently? A. Yes, sir.

George Aiken—For Defendant—Redirect.

Q. Does that keep everyone happier? A. Yes.

Q. So you are using the speakers for a profit? A. When you speak of the profit I am not selling music, people aren't dancing to it, they are not enjoying themselves through it. The customers aren't there long enough to hear more than one or two songs.

Q. They do stand in line while they were waiting for their food and hear the music, do they not? A. Unless they be deaf.

Mr. Wycoff: I have nothing further, your Honor.

Redirect Examination by Mr. Frazier:

Q. Mr. Aiken, he indicated that you benefit a profit from this playing, can you control in any way whatsoever what they are performing, so-called performances, in effect? A. No.

(59) Q. And do you know anybody who goes in your establishment to hear music? A. No.

Mr. Frazier: I have nothing further.

The Court: Thank you, I might ask just one thing, Mr. Aiken, I am not taking sides with either the plaintiff or the defendant at this point because there is a question of law but it really isn't a question of a party trying to shake down someone else, we have a little bit more complicated problem here where the composer is entitled to be paid for the results of his labor, his creative ability and unless there is some way to get royalties on his songs he will never get paid so that is the theory that the plaintiffs are using. Now, your theme is ordinarily that you are running a commercial establishment and that you want to get music that is readily available by turning a knob on a radio set and help everybody be more comfortable and efficient, that works in your shop and you don't think that

there should be an additional payment maybe because that is readily available and these are the two points of view. I am not saying which side I think should govern because it is a matter of law but it isn't a question of a shakedown, it is a legitimate dispute between the parties as to what we do with this particular problem.

Mr. Aiken: Apparently, your Honor, maybe I worded it (60) wrong. Let me state I don't believe that anybody, I don't think anybody should take up the time of the Court on little penny ante things like this. I could easily well pay the license but I think there comes a time in a business you have to say well is it really a law or isn't it. Now, if it is a bona fide law put through a legislature I will pay but if these people are making up their own laws for their benefit the most they can do then is picket my place, then let them picket if the law says I will have to pay I will pay.

The Court: It is a legal question.

Mr. Aiken: That is all I would like to clarify.

The Court: It is a legal question even though this is a small case I think you can understand when you see how many thousand licenses do you have?

Mr. Wycoff: Over 5,000.

The Court: An adverse decision in this case would affect not only your particular case but 5,000 other ones.

Mr. Aiken: I understand that, too, and I think this is sometimes why a lot of these things, Mr. Frazier, he more or less contended that I should just pay the license and forget it, it wasn't worth fighting over and in general this would be the case but sometimes you have to say what is right and what is wrong.

The Court: I will check the law and see what it is.

(61) Mr. Aiken: It is perfectly all right.

(Witness excused.)

Mr. Wycoff: Do you rest your case?

Mr. Frazier: Well, your Honor, at this time my argument indicates that there was no performance on the

part of Mr. Aiken and there was no law to support it. Directly to the fact similar or in kind to the Aiken situation. The plaintiffs make their contentions in cases 40 years ago. Their whole support they bring in no recent case law whatsoever and in regards to the Fortnightly case where they claimed that they had the cable TV is not performing. I think that the relationship to somebody playing a radio would be quite similar because on the case that they rely their whole case was presented on the LaSalle case in which case the original broadcaster was not licensed. Now, they haven't presented any evidence whatsoever in regards to case law or Court ruling as to broadcasts which are previously licensed or in kind similar to the Aiken case. If you either refer to somebody that pumped in music or played records but they have no law to support whatsoever in regards to the number of speakers. This was their own theory and it was unsupported by any law and we feel that this case is not based on any law strictly on the ability of ASCAP to license wherever they may. And apparently we rely (62) on Niemer as an authority in this bill and he indicates that ASCAP haven't proceeded to the extent which they possibly could to license every restaurant, bar or tavern as such. And that we also have an argument in regard to, there is implied in law license that the agreement between the licensor, ASCAP, and the licensee has no relationship whatsoever to somebody who happens to receive a broadcast. And that if it is to be enforced there is a violation, I believe that the licensee should have been brought here as a party. They indicated all through their relationship with the licensor and the licensee that they failed to establish a contract relationship between Mr. Aiken and the licensor.

And in regards to the law they haven't presented any evidence of holding with the mere playing of a radio without beeping out a commercial in its entirety has been the

law where one must obtain a license for infringement on the copyright law and in the recent case on the cable TV as to a performer if the cable TV people who received these waves and amplify them and transmit them through cables to purchasers of their system definitely do profit that holding of the law, the Buck and LaSalle are no longer in being as to the particular case of somebody who plays a radio and receives no direct financial remuneration and that we feel that there is no infringement of the expressly (63) enumerated rights protected by the copyright law but in the LaSalle case the chief case which they hold was where the original broadcaster was unlicensed and had he been licensed it might have had an entirely different conclusion. If Mr. Aiken played the radio he doesn't play records, he doesn't play tapes. He plays a radio in its entirety and that all the broadcasts he receives are licensed broadcasts and, therefore, we think that he has a license implied in law to play it provided by the restriction saying that a profit is generated by it.

Now, Mr. Aiken testified that he charged 10 cents for a cup of coffee and food can be obtained there cheaper. I think it is very difficult to find a place in the City of Pittsburgh where you can find a cup of coffee for ten cents. Practically anywhere in the country we can definitely testify a very important essence of the case that he is operating it publicly for profit and we feel that Mr. Aiken plays this music strictly for the benefit of his employees as he indicated in his testimony that there was three speakers, three out of the five that were not available to the general public. And that the new change in technology in regards to receiving sets as such even the automobile today has a rear speaker so their argument is unfounded and I repeated before there was no law in which they can relate their case and that Mr. Aiken (64) did not perform as to the CATV cases and he definitely did not perform

for a profit. I don't believe the cable TV case went so far as the profit is concerned, there is no doubt about that there since they indicated there was no performance it wasn't necessary to rule on it, no profit. The only evidence which they submitted was the Jewell case and it is definitely not in kind with that of Aiken's case or the case at bar being the original broadcaster was unlicensed.

We feel that to force a player of a radio even though it is within earshot range of the public to pay an additional fee would be unjust enrichment. In the original records a fee was paid for the production of the record and also a fee was paid by the broadcasting station.

Mr. Wycoff: Your Honor, my remarks will be very short because I know that you are aware of the issues in the cases and exactly the decision you have to look to but as to Mr. Frazier's argument about the implied license I think there is no statutory basis or any basis in law for his comments on that and I think that the SESAC v. Statler-Hilton case obviated the problem that was raised in the Buck v. Jewell-LaSalle apparently was not a restriction in the license agreement with Jewell-LaSalle, there was a restriction that did have the license agreement in it, they still found that there was an infringement as to the (65) Fortnightly case, your Honor, I do want to point out that the facts in that case were different from the facts in this case here because in Fortnightly it was talking about television reception in the home. In their Footnote No. 2 they are talking about the community that CATV-TV system serviced. I think seven out of eleven households had this system and in the other one I think it was five out of 9,000 and throughout their opinion they are talking about bringing this to households for their own use in private homes and there was no mention at all about using the television there for public purposes. I think that is a very important thing. This music was heard in a Public res-

taurant. They do hear the music, the employees hear it, we can cite no exclusion in the law that that is not a Public performance for profit. We maintain in an English case under a similar law has very definitely said that it is a Public performance for profit so Fortnightly is different than the present case because here the restaurant the music was being used in a Public place and not in the private home as were the television receivers that were receiving the cable TV and I think that what he is restricted to is the facts, I don't think that they were saying that it is just a hotel which has music in its Public rooms and the rooms. I think they are looking at the more overall picture of the Public use of music in a Public (66) place such as a restaurant as George Aiken's Chicken or the dining room of a hotel.

And the case in Buck v. LaSalle I am sure you are aware that Justice Brandeis did say there is no difference between a hotel having a radio or an orchestra, it is using music by instruments under its control and here Mr. Aiken is doing the same thing, using music by instruments under its control and we did not cite in our brief but I would take you back to it, your Honor, in the brief that we filed in opposition to Mr. Frazier's motion to dismiss still the classic statement of the law in this area has been the case of Herbert v. Shanley where Justice Holmes sets forth that the use of the music in a dining room the importance that it can have in an eating establishment that the owner of such an eating establishment is not running an eleemosynary institution and that the Public pays for it and if it only momentarily gives a benefit to the people in the dining room at George Aiken's Chicken while they are waiting for their food or to the employees, that they work more efficiently it is paying for itself in that way because as you pointed out these were musical compositions which are copyrighted. It is the intellectual property and someone else using it without obligation or authorization is using

taurant. They do hear the music, the employees hear it, we can cite no exclusion in the law that that is not a Public performance for profit. We maintain in an English case under a similar law has very definitely said that it is a Public performance for profit so Fortnightly is different than the present case because here the restaurant the music was being used in a Public place and not in the private home as were the television receivers that were receiving the cable TV and I think that what he is restricted to is the facts, I don't think that they were saying that it is just a hotel which has music in its Public rooms and the rooms. I think they are looking at the more overall picture of the Public use of music in a Public (66) place such as a restaurant as George Aiken's Chicken or the dining room of a hotel.

And the case in Buck v. LaSalle I am sure you are aware that Justice Brandeis did say there is no difference between a hotel having a radio or an orchestra, it is using music by instruments under its control and here Mr. Aiken is doing the same thing, using music by instruments under its control and we did not cite in our brief but I would take you back to it, your Honor, in the brief that we filed in opposition to Mr. Frazier's motion to dismiss still the classic statement of the law in this area has been the case of Herbert v. Shanley where Justice Holmes sets forth that the use of the music in a dining room the importance that it can have in an eating establishment that the owner of such an eating establishment is not running an eleemosynary institution and that the Public pays for it and if it only momentarily gives a benefit to the people in the dining room at George Aiken's Chicken while they are waiting for their food or to the employees, that they work more efficiently it is paying for itself in that way because as you pointed out these were musical compositions which are copyrighted. It is the intellectual property and someone else using it without obligation or authorization is using

someone else's property and I think we all feel that using someone else's property without (67) authorization is wrong. In the Fortnightly case it is shown in the implication of it it was extending the doctrine of Buck v. Jewell-LaSalle to a new industry, to a new fact situation where license fees had not been collected heretofore and that in the brief filed in the Supreme Court it was estimated that the cable TV companies would be subject to infringement of almost a million dollars per month for this type of infringement if the case had been extended and I think that it was as much an economic decision as it was a legal decision. But we maintained very strongly that still the law of the case that has developed and the law for the broadcasting of radio over three speakers was not disturbed by that decision.

Mr. Frazier: Your Honor, the Herbert v. Shanley case, this is the case where an orchestra was playing, it was a restaurant and the rationale of the Court's decision is that the food could be obtained cheaply someplace else in lieu of the music. We presented evidence that George Aiken sells coffee for ten cents and other food prices are way below par. The food is probably cheaper than anyplace in the City of Pittsburgh and cheaper to a large degree. Now, the Shanley case was based on an orchestra place where people were sitting down enjoying themselves. There is no relationship involved. When they are letting the monopoly, (68) it was not to extend to any Tom, Dick and Harry that has a radio just because the speaker system was commenced to play, just because he has a radio playing that he is subject to the copyright. When Mr. Corman and I stopped at George Aiken's Chicken we were charged 15 cents for coffee, that is neither here nor there.

Mr. Wycoff: Mr. Frazier, if you would like a cup of this?

The Court: I thought that you were offering to take him down to the place and get him a cup of coffee.

Mr. Wycoff: Well, if it is crucial, your Honor, as to how many speakers are in that ceiling I think we will have to have a view.

The Court: Thank you very much, gentlemen. I will take the case under advisement.

Mr. Wycoff: Thank you very much, your Honor.

Certified: a true and accurate transcript.

C. R. SHUFF
Official Court Reporter

Plaintiffs' Exhibit 1.

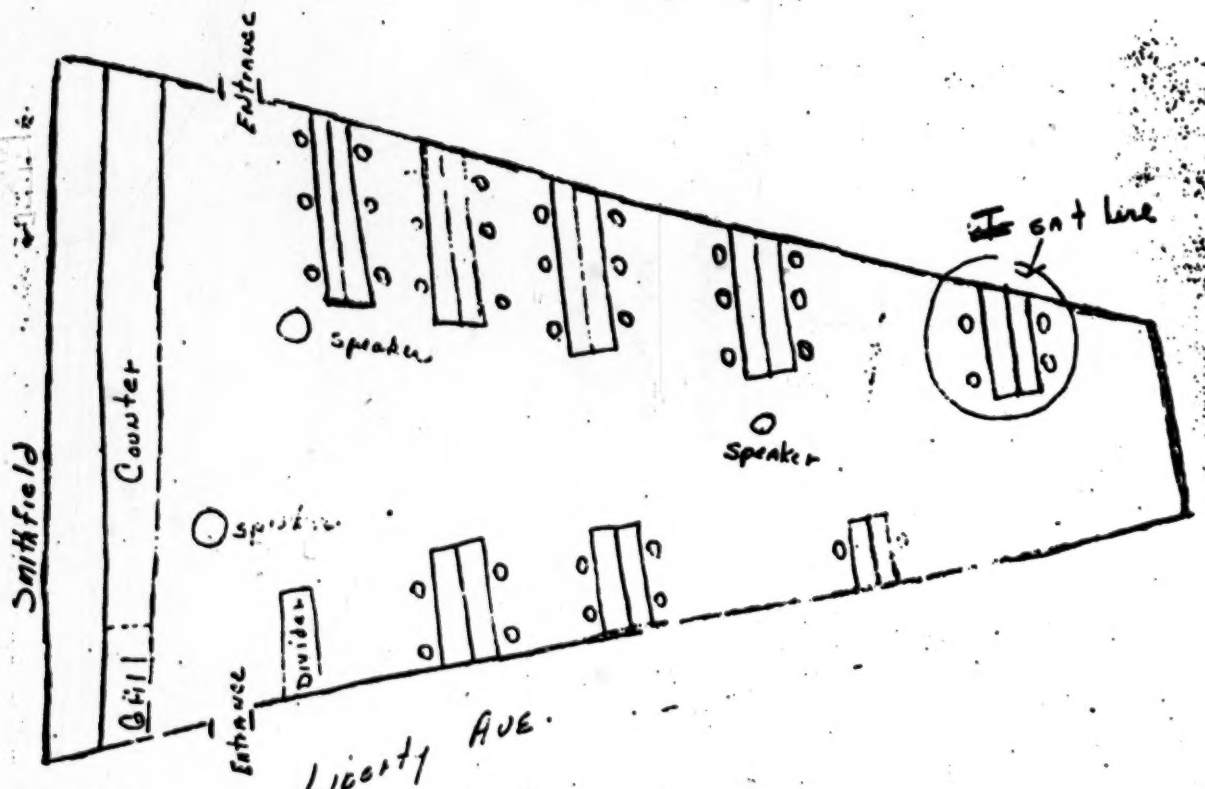
Notes and Sketch.

(Photoprint)

Appendix F

Petitioners' Exhibit 1 (Notes and Sketch) and Exhibit 2 (Radio License) at Trial Below

(Pages 68A to 75A)



c/Lorenzo Piccone
George Aikens on
Liberty Ave. - Smithfield
and 7th Ave.
2/11/72

Plaintiffs' Exhibit 2.

Radio License.

(Photoprints)

71 A

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
One Lincoln Plaza
New York, New York 10023

Re: Radio Station WKJF FM
City Pittsburgh,
State Pennsylvania

Gentlemen:

The radio license agreement between us will expire on February 29, 1972. You and we hereby agree to extend the agreement, and all of the terms, conditions and provisions thereof, for an additional term commencing March 1, 1972 and expiring on the last day of the third full calendar month following the date of a written notice of termination given at any time by either of us to the other by registered or certified mail.

This extension agreement is subject to retroactive adjustment on the basis of the terms and conditions arrived at for the period beginning March 1, 1972 (1) by negotiation between you and the All-Industry Radio Music License Committee or (2) by Court determination of reasonable fees in any proceeding brought by the All-Industry Radio Music License Committee for a determination of reasonable license fees under the Consent Decree.

Your signature underneath the word "ACCEPTED", together with our signature below, will make this a valid, binding and enforceable extension agreement between us.

Sincerely yours,

LICENSEE WKJF, INC.
(Full corporate or other name of station owner)

By Paul S. Lindsey

Treasurer
(Fill in capacity in which signed)

(a) If corporation, state corporate office held;

(b) If partnership, write word "partner" under signature of signing partner;

(c) If individual owner, write "individual owner" under signature.

ACCEPTED:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By Louis P. Weber

Dated: MAR 2 - 1972

LOCAL STATION BLANKET RADIO LICENSE

SEP 3 1967

72 A

Agreement made between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (herein referred to as "SOCIETY") and WKJF, INC.

(herein referred to as "LICENSEE") as follows:

1. SOCIETY grants to LICENSEE and LICENSEE accepts for a period commencing as of March 1, 1967 and ending February 29, 1972, a license to perform publicly by radio broadcasting on LICENSEE'S local radio programs from Radio Station WKJF, - FM located at

1715 Grandview Avenue, Pittsburgh, Pennsylvania

(herein referred to as "the Station") non-dramatic performances of the separate musical compositions heretofore copyrighted, composed or written by members of SOCIETY and now or hereafter during the term hereof in the repertory of SOCIETY, or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights. This license does not extend to or include the public performance by radio broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

2. A. "Local radio program" as used in this agreement shall be deemed to mean any program broadcast from the Station other than a network radio program. The performances licensed hereunder may originate at the Station or at any other place whether or not such other place is licensed to perform publicly for profit the compositions licensed hereunder, regardless of the manner, means, or method of such origination; but nothing herein contained shall be deemed to grant a license to such place itself (or to the parties responsible for the performance therein) for the public performance for profit in such place of any such compositions.

B. "Network radio program" as used in this agreement shall be deemed to mean a program broadcast simultaneously or by so-called "delayed" or "repeat" broadcasts (sometimes known as "rebroadcasts") over two or more affiliated stations.

C. "Affiliated station" as used in this agreement shall be deemed to mean any radio broadcasting station in the United States which regularly broadcasts network radio programs of a radio network or which appears on the radio rate cards of such network and which is interconnected with such network by wire or any other means whatsoever. Such station shall only be deemed to be an affiliated station so long as it regularly broadcasts such programs or appears on such rate cards, as the case may be. All radio broadcasting stations .. the United States which are owned and operated by a network and which broadcast such network's radio programs shall be deemed to be affiliated stations for the purposes of this agreement, whether or not they appear on such network's radio rate cards.

3. LICENSEE agrees to furnish to SOCIETY upon request during the term of this agreement a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions licensed hereunder) broadcast from or through the Station on LICENSEE'S local radio programs, showing the title of each composition and the composer and author thereof; provided that LICENSEE shall not be obligated under this paragraph to furnish such a list covering a period or periods in the aggregate in excess of three months during any one calendar year.

4. A. The members of SOCIETY shall have the right, at any time and from time to time, in good faith, to restrict the radio broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect of other interests under the copyrights thereof; provided, however, that the maximum number of compositions which may be at any time thus restricted shall not exceed 500 and moreover that limited licenses will be granted upon application to SOCIETY entirely free of additional charge as to restricted compositions, if and when the copyright owners thereof are unable to show reasonable hazards to their major interests likely to result from such radio broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial radio broadcast thereof, be restricted for the purpose of confining further radio broadcasts thereof to a particular artist, station, network or program.

B. SOCIETY reserves the further right, at any time and from time to time, in good faith, to restrict the radio broadcasting of any compositions, over and above the number specified in the previous paragraph, only as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of SOCIETY or on a claim that SOCIETY does not have the right to license the public performance of such composition by radio broadcasting.

5. A. In consideration of the license herein granted, LICENSEE agrees to pay to SOCIETY the following:

1. COMMERCIAL FEE: A sum equal to 2% of its "net receipts from sponsors after deduction".

2. SUSTAINING FEE: For each year during the term hereof,

a. 27 times the highest one-minute card rate of the Station for a single minute if it has net receipts from sponsors in excess of $150,000 per year for such year (calculated on a monthly basis at 2¼ times such rate), or,

b. 21.6 times the highest one-minute card rate of the Station for a single minute if it has net receipts from sponsors between $50,000 and $150,000 per year for such year (calculated on a monthly basis at 1.8 times such rate), or,

c. $12.00 if it has net receipts from sponsors of less than $50,000 per year for such year.

If such highest card rates change during any year, the annual sustaining fee of the Station shall be prorated accordingly. The "net receipts from sponsors" for the first year of this agreement are hereby estimated at

ONE HUNDRED AND TWENTY NINE THOUSAND DOLLARS

($ 129,000.00 For each of the succeeding years of this agreement such net

receipts from sponsors shall be estimated on the basis of the actual net receipts from sponsors for the preceding year. Within thirty (30) days after the end of each contract year a final adjustment shall be made on the basis of actual net receipts from sponsors for such contract year. The sustaining fee for any period of less than a year at the end of the term of this agreement shall be prorated.

B. The term "net receipts from sponsors" as used in this agreement shall be deemed to mean the gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs, as defined herein, less any advertising agency commission not to exceed 15% actually allowed to a recognized advertising agency not owned or controlled by LICENSEE.

C. The term "net receipts from sponsors after deduction" as used in this agreement shall be deemed to mean net receipts from sponsors, less a sales commission on the net receipts from sponsors equal to 15% of such net receipts.

D. The term "gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" as used in this agreement shall be deemed to mean all payments made (whether in money or in any other form) by or on behalf of the sponsor of each program for the use of the radio broadcasting facilities of the Station for all such local radio programs, after deducting only rate card discounts, cash, quantity and/or frequency, actually allowed, and whether such payment shall have been made directly to LICENSEE or to any other persons, firms or corporations. Where merchandise, services or any thing or service of value is received in lieu of cash consideration for the use of the radio broadcasting facilities of the Station, the same shall be described and the reasonable value thereof determined and accounting made to SOCIETY upon the same basis as if a regular billing had been made by LICENSEE therefor in a sum equal to such reasonable value which in no event shall be deemed to exceed LICENSEE'S prevailing published card rate for such radio broadcasting facilities.

E. There shall be excluded from the "gross amount paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" all compensation with respect to any week over and above the total weekly amount indicated below, actually paid by the Station for such week to personnel whose duties primarily are acting as (a) master of ceremonies or disk jockey on musical programs, or (b) vocalist or instrumentalist engaged for a specific program, or (c) featured newscaster and news commentator, or (d) featured sportscaster, or (e) master of ceremonies on an entertainment progam, or (f) announcer:

Station's Annual "Net Receipts from Sponsors"	Total Weekly Amount
Less than $ 50,000	$ 100
$ 50,000 to $ 150,000	$ 300
$150,000 to $ 300,000	$ 450
$300,000 to $ 500,000	$ 675
$500,000 to $ 750,000	$ 750
$750,000 to $1,000,000	$ 875
Over $1,000,000	$1,000

The total weekly amount for each contract year shall be based on the estimates of "net receipts from sponsors" made in accordance with Paragraph "5A2" for the sustaining fee. Within thirty (30) days after the end of each contract year, the total weekly amount for such contract year shall be adjusted on the basis of the actual "net receipts from sponsors" for such contract year.

F. Co-operative programs are programs which are furnished by a network to its affiliated stations under an arrangement permitting an affiliate to broadcast such programs on a sustaining basis or on a commercial basis under the sponsorship of a local, regional or national advertiser contracting directly with such affiliated station or its representative for the incorporation of the commercial credits of such advertiser into the program as broadcast by such affiliated station. For the purposes of this agreement only, and without prejudice to the position of SOCIETY or LICENSEE or any network of which LICENSEE is an affiliated station as to the status of co-operative programs under SOCIETY'S television broadcasting licenses, such co-operative radio programs shall be deemed to be "local radio programs" as defined herein.

G. No payment shall be required hereunder with respect to any sums received from political local radio programs of LICENSEE.

H. No payment shall be required hereunder with respect to a local commercial radio program of LICENSEE presented by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the source to perform on such local commercial radio program by means of such transcription the musical compositions embodied therein.

I. If any local radio program of LICENSEE produced solely for broadcasting purposes is presented in a studio, auditorium or hall where an audience is admitted free of charge, or where the entire admittance charge is paid to an eleemosynary institution which shall request a gratuitous license from SOCIETY, no additional royalties or fees shall be charged by reason of the presence of such audience.

6. A. As to SUSTAINING FEE, LICENSEE shall on the twentieth day of each month during the term hereof pay to SOCIETY a sum equal to 1/12th of the sustaining fee payable hereunder and such payments shall be accompanied by statements setting forth the basis upon which the computation is made.

B. As to COMMERCIAL FEE, LICENSEE shall render monthly statements to SOCIETY on or before the twentieth day of each month covering the period of the preceding calendar month, on forms supplied gratis by SOCIETY, with respect to all gross amounts paid for the use of radio broadcasting facilities for LICENSEE'S local radio programs, and also showing all deductions in order to arrive at "net receipts from sponsors" and "net receipts from sponsors after deduction" as herein provided, without exception, and the percentage thereof payable to SOCIETY, which statements shall be accompanied by remittance due SOCIETY under the terms hereof.

C. Accountings and payments shall be made on a billing basis, with the right of deduction or rebate for bad accounts and discounts allowed or rebates paid. All billings made subsequent to the termination of this agreement with respect to local radio broadcasts made during the term hereof shall be accounted for by LICENSEE as and when such billings are made by LICENSEE.

D. LICENSEE shall also furnish to SOCIETY not later than twenty (20) days after the end of each contract year a statement, on forms supplied gratis by SOCIETY, with respect to all "gross amounts paid for the use of radio broadcasting facilities of the Station for LICENSEE'S local radio programs" during such year, and also showing all deductions in order to arrive at "net receipts from sponsors" for such year as herein provided without exception.

7. SOCIETY shall have the right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any statement of accounting required pursuant hereto. SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

8. Upon any breach or default by LICENSEE of any terms herein contained relating to the reports, accountings or payments required to be made by LICENSEE, SOCIETY may give LICENSEE thirty (30) days' notice in writing to cure such breach or default, and in the event that such breach or default has not been cured within said thirty (30) days, SOCIETY may then promptly terminate this license.

9. A. SOCIETY agrees to indemnify, save and hold LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them harmless, and defend LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them from and against any claim, demand or suit that may be made or brought against them or any of them with respect to performances given on LICENSEE'S local radio programs during the term hereof in accordance with this license of (a) "cleared compositions", or (b) musical compositions heretofore copyrighted, composed or written by members of SOCIETY and now or hereafter during the term hereof in the repertory of SOCIETY, or (c) musical compositions hereafter during the term hereof copyrighted, composed

or written by members of SOCIETY, or (d) musical compositions which SOCIETY shall hereafter certify in writing to LICENSEE as musical compositions copyrighted, composed or written by members of SOCIETY and included in SOCIETY'S repertory for the purposes of this agreement, or (e) musical compositions "deemed to be included in the repertory of SOCIETY" in accordance with the provisions of Sub-paragraph "C" of this Paragraph "9". In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall promptly give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY at its own expense shall have sole charge of the defense of any such action or proceeding. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and prosecute any appeals taken therein. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of the performance on LICENSEE'S local radio programs of any musical composition (other than a "cleared composition") contained in the repertory of SOCIETY but not heretofore or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY and not certified by SOCIETY as a musical composition copyrighted, composed or written by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that LICENSEE may elect to take from any judgments or orders entered therein.

B. As used in this Paragraph "9", a "cleared composition" shall mean any composition in the repertory of SOCIETY, not copyrighted, composed or written by a member of SOCIETY, which SOCIETY shall have notified LICENSEE is a composition with respect to which SOCIETY is willing to indemnify LICENSEE, provided that the performance of such composition shall be made on the specific local radio program of LICENSEE for which a clearance shall have been given by SOCIETY; provided further, however, that in the event that SOCIETY notifies LICENSEE in writing that it is willing to clear such a composition without limitation to a specific program, such composition shall thereafter be regarded as a "cleared composition" until such time as SOCIETY shall rescind such clearance.

C. For the purpose of this Paragraph "9" only, any musical composition (other than a musical composition or group of musical compositions expressly excepted therefrom or that may be restricted because of the operation of Paragraph "4" hereof) which is listed in the bound volumes entitled "ASCAP Index 1963" as the same may have been revised heretofore or as the same may hereafter be revised, as a musical composition heretofore copyrighted by a present member of SOCIETY shall be deemed to be included in the repertory of SOCIETY. SOCIETY shall have the right to make reasonable revisions in such Index from time to time, provided, however, that no such revision and no exception referred to above shall be effective as to any broadcast of LICENSEE'S local programs made, or delayed or repeat broadcasts thereof scheduled, prior to the date on which LICENSEE shall have received notice of such revision or exception. Nothing in this Sub-paragraph "C" shall be deemed to limit LICENSEE'S rights or to limit or affect LICENSEE'S obligations to pay the license fees payable under this agreement or to limit SOCIETY'S obligations to indemnify as provided in Sub-paragraph "A" of this Paragraph "9".

D. The provisions contained in Paragraph "9" shall apply to LICENSEE'S sponsors and their advertising agencies, and its or their artists, as to LICENSEE'S local radio programs with the same effect as if in each instance there had been added to "LICENSEE" the words "its sponsors and their advertising agencies, its and their artists, and each of them".

10. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY. In case there shall be a substantial diminution, by reason of action by SOCIETY or any such members, in the use which LICENSEE may make of compositions copyrighted, composed or written by such members of SOCIETY as compared to the use which LICENSEE customarily has been permitted to make of such compositions prior to the actual execution of this agreement or in case there shall be a substantial diminution in SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY, LICENSEE may give SOCIETY thirty (30) days' notice in writing to cure such substantial diminution. In the event that such substantial diminution in use or repertory has not been cured within said thirty (30) days, LICENSEE may then promptly terminate this agreement. If LICENSEE does not so terminate, LICENSEE shall have the right to obtain a reduction, as hereinafter provided, in the percentage payable on its "net receipts from sponsors after deduction" proportionate to such substantial diminution in use or repertory.

In the event that (a) such a substantial diminution in use or repertory shall have occurred and LICENSEE shall have notified SOCIETY thereof, and (b) SOCIETY shall not have cured such diminution within thirty (30) days thereafter, and (c) SOCIETY and LICENSEE shall be unable to agree within such thirty (30) days either as to the existence of such a diminution as would justify a decrease in the license fees payable hereunder or as to the appropriate reduction in the percentage payable on LICENSEE'S "net receipts from sponsors after deduction" by reason of such diminution, and (d) LICENSEE shall not have terminated this agreement as herein provided, the controversy shall be determined by arbitration as herein provided.

In the event that such a substantial diminution in use or repertory shall have been determined to exist as herein provided and thereafter SOCIETY shall have cured such diminution, SOCIETY shall have the right to obtain, as herein provided, the restoration of any reduction theretofore made in the license fees payable under this agreement by reason of such diminution. In the event that SOCIETY shall notify LICENSEE that in SOCIETY'S opinion any substantial diminution in use or repertory shall have been cured and within thirty (30) days thereafter SOCIETY and LICENSEE shall be unable to agree as to whether or not such diminution shall have been cured, the controversy shall be determined by arbitration as herein provided.

Any award of the arbitrators with respect to any controversy submitted to arbitration under this Paragraph "10" and reducing or restoring the percentage payable by LICENSEE hereunder shall be effective as of whichever shall be the later of (a) the date on which LICENSEE or SOCIETY, as the case may be, shall have given the other notice of such substantial diminution in use or repertory or the curing thereof, or (b) the date, if any, which the arbitrators shall specify as the date on which such diminution occurred or was cured.

In case any controversy is to be determined by arbitration as provided above, such arbitration shall be conducted under and pursuant to the laws of the State of New York, in accordance with the provisions of Paragraph "11" hereof.

In case the arbitrators shall determine that there has been such a substantial diminution in use or repertory and shall make an award reducing the percentage payable by LICENSEE on its "net receipts from sponsors after deduction", the reduction in such percentage payable by LICENSEE made by such award shall in no event be greater than the participation in such percentage payments of the publisher member or members of SOCIETY whose catalogue or catalogues shall have been the subject of such substantial diminution in use or repertory. The participation of such publisher member or members in such percentage payments made by LICENSEE hereunder shall be deemed to be the same percentage of such payments by LICENSEE as the percentage which such publisher member's or members' income from SOCIETY in respect of radio distribution for the year immediately preceding shall bear to the entire distribution of royalties in respect of radio by SOCIETY to all of its publisher members during such year.

11. In the event that during the term of this agreement there is to be determined by arbitration hereunder whether there has been such a substantial diminution in use or repertory and, if so, the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10", each party shall on written notice to the other appoint an arbitrator within two (2) weeks after the expiration of the applicable thirty (30) day period specified in Paragraph "10" hereof.

In the event that within ten (10) days after the giving of such notice by one party, the other shall not by written notice appoint another arbitrator, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the second arbitrator. When two arbitrators have been appointed they shall, if possible, agree upon a third arbitrator and shall appoint him by notice in writing, in triplicate, signed by both of them, one of which triplicate notices shall be given to each party hereto. If ten (10) days shall elapse after the appointment of the second arbitrator

without notice of the appointment of the third arbitrator having been given, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the third arbitrator. Upon appointment of the third arbitrator the three arbitrators shall hold a hearing and give opportunity to each party hereto to present his case in the presence of the other, and shall then make their award determining the license fees which shall be paid by LICENSEE to SOCIETY, taking into consideration all applicable factors which tend to determine whether there has been such a substantial diminution and, if so, the extent thereof and the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10". The arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect.

The award of the majority of the arbitrators shall be binding upon the parties hereto, judgment may be entered thereon in any court having jurisdiction, and this agreement shall be deemed to be modified accordingly. Such award shall include the fixing of the expenses of the arbitration, which shall be borne equally by both parties.

12. In the event of the termination or suspension of the governmental licenses covering the Station or any substantial alteration or variation of the terms and conditions thereof, or any major interference with the operations of the Station due to governmental measures or restrictions, LICENSEE shall have the right to terminate this agreement upon seven (7) days' written notice.

13. In the event of:

(a) any major interference with the operation of SOCIETY in the state, territory, dependency, possession or political subdivision in which the Station is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this agreement on thirty (30) days' written notice to LICENSEE.

14. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered or certified United States mail addressed to such other party at its main office for the transaction of business.

15. This agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder.

16. Attached hereto is a form of "local station per program radio license". By giving SOCIETY written notice thereof at least ninety (90) days prior to the commencement of the third contract year hereof, LICENSEE may substitute said local station per program radio license agreement in place hereof, in which event, effective with the commencement of the third contract year hereof, said per program radio license agreement shall be in full force and effect between LICENSEE and SOCIETY for the balance of the term of this agreement.

17. Attached hereto is a copy of a letter of interpretation dated March 1, 1967, which shall be deemed a part of this agreement.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this day of , 19 , as of the first day of March, 1967.

SEP 12 1967

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By Louis G. Weber
EXECUTIVE

WKJF, INC.

Louis S. Schwadel
LICENSEE Treasurer

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